Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

JAMES BENJAMIN, JR.

Petitioner,

v.

THE AROOSTOOK MEDICAL CENTER, et al

Respondants.

Petition for Writ of Certiorari to the
UNITED STATES COURT OF APPEALS
For the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Civil Rights Act, 42 U.S.C. Section 1981(b), as amended. 1991, applies to and covers post contract formation incidents, activities and relations, including termination?

2. Whether the Appellate Court's holding of Res Judicata was an abuse of discretion when such holding is made and based upon prejudicial assumption of facts and issues not in evidence?

3. Whether the Defendants are state actors within the purview of 42 U.S.C. Section 1983 for the purpose of implementing Maine State Law, 24 M.R.S.A. 2506?

4. Whether the Sherman Anti-Trust Act Section 1, 2 and 15 are invoked by Defendant's efforts to eliminate Plaintiff as a competitor for their services?

5. Whether Defendants are entitled to immunity under title 42 U.S.C. section 11111 (a)(1) while Defendants had violated 42 U.S.C. Sections 11112 (b)(2)(A) by holding a hearing in eight(8) days, wherein the Statute provides; " (A) the place, time, and date of the hearing, which date shall not be less than 30 days after the date of the notice,...?

6. Whether the trial Court erred in finding that Defendants were entitled to immunity from suit under State Law?

II

PARTIES

Plaintiffs and Appellants before the Federal District Court of Maine were the Petitioners herein, James Benjamin, Jr., M.D., on behalf of himself. Defendants and Appellees before the Federal District Court were, THE AROOSTOOK MEDICAL CENTER, Arthur R. Gould Memorial Hospital Division, its agents, servants, constructors, medical staff, nurses, associated physician, including but not limited to: Maryann Walsh, M.D., Ronald Rohe, M.D., Bruce Alexander, M.D., David Jones, M.D., Michael MacPherson, Chairman, Board of Directors, David Peterson, Executive Director, Robert Shaw, M.D., Jeannette McBurnie, R.N., Gordon Smith, Esquire, Stephen Wood, M.D., Nancy Guerretti, R.N., William Silber, M.D., Paul Hamlin, M.D., James Haeberlin, M.D., Albert Hobbs, Jon Does Four through Fifty, and Jane Does One through Fifty, et al.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS	1

I

STATEMENT OF THE CASE		2
A.	Introduction	2
B.	Factual Background	4

II

ANTI-TRUST INJURY FACTS	7
SUMMARY JUDGMENT STANDARD	9
Argument	10
CLAIMS UNDER 42 U.S.C. 1981	14
RES JUDICATA	18
STATE ACTION	21
CONCLUSION	29

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

	Pages
Adickes v. S.H. Kress & Co., 398 U.S. 144; 09 S. Ct. 1598; 26 L Ed. 142 (1970)	22,26
Anderson v. Liberty Lobby, 477 U.S. 242, 91 L Ed. 2d 202, 106 S. Ct. 2505 (1986)	9
Binderup v. Path Exchange, 263 U.S. 291, 68 L Ed 308, 44 S. Ct. 96	14
Bolt v. Halifax Hosp. Med. Center, 891 F2d 810, cert den 495 U.S. 924 (11th Cir. 1990)	28
Burton v. Wilmington Parking Authority, 365 U.S. 715; 81 S. Ct. 856; 6 L.Ed. 2d 45 (1961)	26,29
Edmonson v. Leesville Concrete Co., 500 U.S. 614; 111 S.Ct. 2077; 114 L. Ed 2d 660 (1991)	23,26
Fashion Originators Guild v. Federal Trade Commission, 312 U.S. 457, 85 L Ed 949, 61 S. Ct. 703.	14
Klor's Inc. v. Broadway Hale Stores, Inc. (1959) 359 U.S. 207, 3 L Ed 2d 741, 79 S. Ct. 705	11,12
Lorain Journal Co. V. United States, 342 U.S. 143, 96 L Ed 162, 72 S. Ct. 181.	14

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) 23, 26

Marsh v. Alabama, 326 U.S. 50; 66 S. Ct. 276, 90 L. Ed., 265 (1946) 26

McDonnell Douglas Corp., v. Green, 411 U.S. 792, 36 L Ed. 2d 668, 93 S. Ct. 1817 (1973) 15, 16

Norfolk Monument Co., v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 22 L Ed 658, 89 S., Ct. 1391 10

Patterson v. McLean Credit Union, 491 U.S. 164, 176, 177 (19) 15

Patrick v. Burget, 108 S. Ct. 1658; 486 US 94; 100 L. Ed. 2d 83 (1988) 27

Peterson v. City of Greenville, 373 U.S. 244; 83 S. Ct. 1119; 10 L Ed 323 (1963) 22

Poller v. Columbia Broadcasting System , 368 U.S. 464 (1962) 10

Silver v. Castle Memorial Hospital, 52 Hawaii 475, 497 P2d 564, cert den 409 U.S. 1048 24, 28

Simkins v. Moses H. Cone Memorial Hospital, 323 F2d 959 cert den 376 U.S. 938 25, 27

Stanturf v. Sipes, (1964, CA8 Mo.) 335 F2d 244, cert den 379 U.S. 977; 13 L. Ed. 2d 567, 85 S. 25, 29

Ct. 676

Stutson v. U.S., 116 S. Ct. 600 (1996) 28

Summit v. U.S., 116 S. Ct. 600 (1996) 13

Terry v. Adams, 345 U.S. 461; 73 S. Ct. 809; 97 L. Ed. 1152. (1953) 26

Texas Department of Community Affairs v. Bardine, 450 U.S. 248, 255; 67 L Ed 2d 207, 101 S. Ct. 1089 (1981). 16

Times-Picayune Publising Co., v. United States, 345 U.S. 594, 97 L Ed 2d 545, 78 S. Ct. 514. 11, 14

West v. Atkins, 487 U.S. 42, 108S. Ct. 2250; 1011, Ed. 2d 40 (1988) 13, 16, 20

UNITED STATES COURT OF APPEALS CASES:

Pages

Ascherman v. Presbyterian Hosp., 507 F2d 1103 28

Ayala-Gerena v. Bristol Myers Squibb Co., 95 F 3rd 86, 95 (1st Cir. 1996). 15

Balkisson v. Capitol Hill Hosp., (1986, Dist Col App) 558 A2d 304 29

Boczar v. Manatee Hospital and Health System, 993 F 2d 1514, 1519, (11th Cir 1993). 13, 14, 15

Brader v Allegheny General Hospital, 64 F3d 869 (3rd Cir) 1995	12, 13, 14
Brisco v. Bock, 540 F2d 392 (8th Cir. 1976)	29
Brown v. Presbyterian Health Care Services, 101 F. 3rd 1324, 1335, (10th Cir 1996)	15
Chiaffitelli v. Dittmer Hospital, Inc., (1971, CA6 Ohio) 437 F 2d 429	25, 27
Christhilf v Annapolis Emergency Hospital Association. (CA4Md) 496 F2d 174 , 552 F2d 1070	24, 29
Conner v Donnelly, 42 F 3d 220 (4th Cir. 1994)	23, 26
Cypress v. Newport news General and Nonsection Hospital Assoc. (1967, CA4 Va) 375 F2d 648	26
Decker v. IHC Hosp., Inc., (1992, CA 10 Utah) 982 F2d 307	28
Doe v. Charleston Area Medical Center, Inc., (1975, CA4 W. Va) 529 F2d 638	25, 26
Duffield v. Charleston Area Medical Center, Inc., (1974, CA4 W Va.) 503 F2d 512	26
Eaton v. Grubbs, (1964, CA4 NC) 329 F2d 710	25, 27
Fuentes v. South Hills Cardiology, 946 F 2d 196	13, 14

(3rd Cir. 1991)

Greco v. Orange Memorial Hosp. Corp., 513 F2d 873 (5th Cir 1975) 27

Harris v. Bellin Memorial Hosp., (1994, CA7 Wis) 13 F3d 1082 27

Hodge v. Paoli Memorial Hosp., (1978 CA3 Pa) 576 F2d 563 29

Hodgson v. Lawson, (1976, CA8) 542 F2d 1350 29

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Klinge v. Lutheran Charities Assoc., (1975, CA8 Mo.) 523 F2d 56 25, 29

Laje v. R.E. Thomason General Hospital, (1982, CA5 Tex) 665 F2d 724: 670 F2d 181 25, 27

Lawler v. Eugene Wuesthoff Memorial Hospital Asso. (1986, Fla. App. D5) 497 So. 2d 1261 24, 28

Lie v. St. Joseph Hosp., (1992, CA6 Mich) 964 F2d 567 17

Malia v. General Electric Co., 23 F3d 828, 830 (3rd Cir) 8

Manion v. Evans, (1991 ND Ohio) 1991 U.S. Dist LEXIS 14986, app dismd (CA Ohio) 986 F 27

2d 1036, 1993-CCH Trade Cases 70135, 121 A L R Fed 705

Mary v. Sorel, 558 F2d 303, 305, 306, (5 CA 1977) 27

Mendez v. Belton, 739 F2d 15 (1st Cir. 1984) 28

Meredith v. Allen County War Memorial Hosp. Comm., (1968, CA6 Ky) 397 F2d 33 27

Modaber v. Culpepper Memorial Hospital 674 F2d 1023 (4th Cir) 28

Musso v. Suriano, 586 F2d 59 (7th Cir. 1978) 27

O'Neill v. Grayson County War Memorial Hospital, (1973, CA6 Ky) 472 F2d 1140 25, 27

Okusami v. Psychiatric Inst. of Washington, Inc., (1992) 295 US App DC 58 959 F2d 1062 29

Rowlett v. Anheuser-Busch, Inc., 832 F 2d 194, 201 (1st Cir 1987) 16

Sams v. Ohio Valley General Hospital Assc. (1969, CA4 W. Va) 413 F2d 826 24, 26

Schlein v. Milford Hosp., Inc., 561 F2d 427 (2nd Cir. 1977 28

Smith v. Hampton Training School for Nurses, (1966, CA4 Va) 360 F2d 577 25, 26

Taylor v. St. Vincent's Hosp., 523 F2d 75 (9th Cir. 1975) 28

Ward v. St. Anthony's Hosp., 476 F2d 671 (10th Cir. 1973) 28

Watkins v. Mercy Hosp. Center, 520 F2d 894 28

Weiss v. York, 745 F2d 786 (1984) 29

FEDERAL DISTRICT COURT CASES:

Page

Acosta v. Tyrone Hosp., (1976, DC Pa) 410 F. Supp. 434 29

American Hospital Assoc. v. Bowen, 834 F2d 1037 (DC Cir. 1987) 29

Atkins v. Lanning, (DC Okla) 415 F. Supp. 186 28

Barrett v. United Hosp., 376 F. Supp. 791 (1974) 28

Bearden v. Humana Health Plan (1992, ND Ill) 1992 U.S. Dist. Lexis 14036-7 CA 27

Bricker v. Sceva Speare Memorial Hosp., 339 F. Supp. 234 (1972) 28

Caine v. Hardy, (1989, SD Miss) 715 F. Supp. 166; 27

Citta v. Delaware Valley Hospital (1970, DC Pa) 313 F. Supp. 301 — 24,29

Cohn v. Wilkes General Hosp. (1988, WD NC) 127 F.R.D. 117 — 26

DeCarlo v Joseph Horne & Co., 251 F. Supp 935 (1966) — 23

Drury v Horizon Sav Bank , 762 F. Supp. 235 (N.D. Ill. 1991) — 23, 27

Fobbs v. Holy Cross Health System Corp., (1992, ED Cal) 789 F. Supp 1054 — 27

Goldsmith v. Harding Hosp. Inc., (1991, SD Ohio) 762 F Supp. 187 — 27

Harron v. United Hospital Center, Inc. (1974, DC W. Va) 384 F. Supp 393 — 24, 26

Hartsell V. Duplex Products, Inc., 895 F. Supp 100 (1995, WD NC) — 26

Holmes v. Silver Cross Hospital (1972, DC Ill.) 340 F. Supp 125 — 25, 27

Islami v. Covenant Medical Center, (1992 ND Iowa) 822 F. Supp 1361 — 29

Johnson v. Greater South West Community Hosp. Corp., (1991) D.C. Distric Col. 789 F. — 24, 29

Supp. 427

Large v. Reynolds (1976, DC W. Va) 414 F. Supp. 45 — 26

Le Masters v. Christ Hosp., Inc., (1991, SD Ohio) 791 F. Supp 188 — 27

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Newson v. Vanderbilt Univ., 453 F. Supp. 401 (1978) — 27

Ozlu v. Lock Haven Hosp., (1974, DC Pa)369 F Supp 285 — 29

Pagano v Oroville Hospital, 145 F.R.D. 683 (E.D. Cal. 1993) — 10,12,27

Pollock v. Methodist Hosp., (1975, DC La) 392 F2d 393 — 27

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Samont v. Hanimann Med. Col. and Hosp. 413 F. Supp. 434 — 27

Shulman v. Washington Hosp., Center (1970, DC Dist Col) 319 F.Supp 252 — 29

Sokol v. University Hospital Inc., (1975, DC — 28

Mass) 402 F. Supp. 1029

Teasdale v. Marin Gen. Hosp. (1991, ND. Cal) 138 F.R.D. 691 — 25, 27

Wei v. Bodner, (1989, DC NJ) 127 F.R.D. 91 — 28

29

STATE COURT CASES:

Pages

Anton v. San Antonio Community Hospital 19 Cal 3d 802; 141 Cal Rptr CA442; 567 P2d 1162 — 24, 28

Applebaum v. Board of Directors of Barton Memorial Hospital, (1980, 3d Dist) 104 Cal App. 3d 648, 163 Cal Rptr 831 — 24, 28

Asckerman v. San Francisco Medial Soc., 39 Cal App 3d. 623: 114 Cal Rptr 681 — 28

Boulet v Beals, 158 Me. 53; 177 A2d 665, 667 (1962) — 11

Benjamin v. Aroostook Medical Center, Law Docket No. Aro. 95-569 (Me. November 14, 1996). — 20

Dworkin v. St. Francis Hosp., Inc., (1986 Del Supr.) 517 A.2d 302 App. den w/o op (1987 Del Sup.) 521 A. 2d 649 — 29

Jackson v Faber, 834 F. Supp. 471 (D. Me. 1993) 23

Lee v. Colorado Dept. of Health, 718 P2d 221 (Colo 1986) 28

Nashville Memorial Hospital v. Brinkley (Tenn.) 534S W2d 318 24

Onat v. Penobscot Bay Medical Center, 574 A.2d 872 (Me. 1990) 28

People v Farrow, 455 N.W. 2d 325 (Mich. App. 1990) 23

Re Zaman, 285 SC 345, 329 S.E. 2d 436 26

Rippet v. Bemis, 672 A.2d 82 (Me. 1996) 11

Rosenblit v. Superior Court, 231 Cal App. 3d 1434: 282 Cal Rptr 819 (1991) 24,27

Storrs v. Lutheran Hospitals and Homes Soc. (Alaska) 609 P2d 24 24,28

OPINIONS BELOW

In the United States Court of Appeals For the First Circuit, Civil Action, No. 96-2047, Hons. Selya, Cyr and Boudin, Circuit Judges, First Circuit Court of Appeals presiding: James Benjamin, Jr., M.D., Plaintiff, Appellant v. The Aroostook Medical Center, et al, Defendants, No. 96-2047, May 9, 1997, [Reprinted at Apps.].

In the United States Court, District of Maine, Civil Action, No. 95-CV-253-B, Hon. Morton A. Brody, United States District Judges presiding: James Benjamin, Jr., M.D., Plaintiff v. The Aroostook Medical Center, et al, Defendants, No. 95-CV-253-B, August 8, 1996, [Reprinted at Apps.].

JURISDICTION

After the United States Court of Appeals For the First Circuit issued its decision on May 9, 1997, Plaintiff timely filed a Petition for Rehearing on May 22, 1997, which Petition was denied on June 6, 1997. On June 12, 1997, Appellant then filed with the Clerk of Said Court a Notice of Intention to Apply for a Writ of Certiorari to be filed on or before August 7, 1997. Thus, jurisdicition is conferred upon this Court by 28 U.S.C. Sect. 1254 (1).

STATUTES AND REGULATIONS

42 U.S.C. Sections 11111, 11112, 11133, 11134 and 11135.

42 U.S.C. Sections 1981 and 1983

24 M.R.S.A. Sections 2501 - 2511

[Reprinted in full at Appendix.]

STATEMENT OF THE CASE

A. Introduction

This case presents important questions arising unde rthe Health Care Quality Improvement Act of 1986, 42 U.S.C. 11101 - 11152 (1995), under the Federal Civil Rights Act, 42 U.S.C. 1981, 1983, et seq., (1994), under the State of Maine Health Security Act, 24 M.R.S.A. 2501 - 2511 (1990 and Supp. 1995), 15 U.S.C. 1, 2, 14, 15, 24 and 26; 18 U.S.C. 871 et seq., 28 U.S.C.A. 1343, 1337; F.R.C.P. 8(a), 65.

These laws have created Circuit splits and which in combination threaten to intensify further suits between physicians and hospitals across the Federal System.The instant case petitions for Certiorari to the United States Court of Appeals for the First Circuit, Before Hons. Selya, Cyr, and Boudin, Circuit Judges. The case came up on appeal from an entry of judgment in the United States District Court for the District of Maine by the Honorable Morton A. Brody, United States District Judge for Said District. The District Court judgment contained the following orders:

(1) "GRANTS Defendant's Motion for Summary Judgment on all Counts: and

(2) "DENIES Defendant's request for attorney's fees

The decision from the United States Court of Appeals for the First Circuit contained, among other things, the following issues:

(1) "... the denial of revocation of hospital privileges ... in cases involving individual determinations of incompetence ... was reviewed under ... the rule of reason."

(2). Whether Appellant showed "... harm to competition, either directly or by reasonable inference."

(3). Whether Defendant. The Aroostook Medical Center intentionally discriminated against Petitioner by reason of his race in violation of 42 U.S.C. 1981 (b).

(4) Whether Petitioner was an employee within the purview of the Civil Rights Act of 1964, Sec. 701 et seq., 42 U.S.C.A. Sec 2000e et seq.?

(5) Whether the filing by Defendant Hospital, "false reports with the National Practitioner Dates Bank and the Maine State Medical Board "constituted "malicious abuse of Process."

(a) Whether extortion may be equated to "abuse of process"?

(6). Whether the same parties and privies are involved Count Three of the present Action and in the prior 1996 Maine Supreme Judicial Court Action; whether a valid final judgment had been rendered; and, whether the issues were the same in both actions, so as to apply the doctrine of res judicata.

(7). Whether Appellee-Hospital "... was immune from appellant's State law tort claims concerning the peer review process?

(8). Whether State claims that are pendant to federal question cases are governed by federal rather than state privilege law.

(9). Whether State of Maine privilege law, (24 M.R.S.A. 2511) which grants immunity from suit to hospital, its medical staff and professional competence committee is inconsistent with the Immunity Privilege of the Federal Health Care Quality Improvement Act?

(10) Whether Appellee-Hospital "... Constitutes a state actor for purpose of Section 1983"

Further, the petition will address the issues of state action in the denial of physician's hospital privileges across the eleven federal judicial circuits.

B. Factual Background.

The Complaint is for Damages for Monopolizing Part of Medical Trade, Service or Commerce; Denial of Hospital Privileges; Restraint of Trade and Attempted Monopolization; and Restraint of Trade.

The Aroostook Medical Center (TAMC) is a quasi-public agency, doing business as TAMC. The relevant line of commerce is the specialized practice of internal medicine. Petitioner was in direct competition with the individual defendants physicians, nurses and attorney who performed their acts together in concert, and shared fees as individual and independant physicians with Defendant-Hospital.

The geographic Market is Aroostook County Maine. The total internal medicine fees in the relevant market exceeds One Million Dollars annually. Patients, equipment and supplies move between states. Substantial amount of payments are from out of state, e.g., medicare, medicaid and insurers.

On or about December 31, 1992, Defendant combined and started accusations relative to the Petitioners ability to render patient care. (App. 221)

December 31, 1993 Defendant Hospital terminated Petitioner's Hospital privileges November 18, 1993, Defendant Hospital sent a letter to the Maine State Medical Board stating that Petitioner had been suspended because of his unavailability. Petitioner was in fact available.

Defendant Physicians and nurses caused displicinary action to be filed aghainst Petitioner. Defendant-Hospital and hospital personnel together with the physician medical staff issued statement to the community which were later proved to be false.

TAMC physicians dominated all hospital medical committees Defendant-Hospital rendered separate treatment to Petitioner. As a consequence Petitioner filed civil rights claims.

Defendant-Hospital, refused to permit Petitioner to read and interpret EKG Reports because of his race. (Note EKG was an approved privilege and procedure). Hospital refused to furnish necessary nursing back-up support. Nurses refused to carry out-patient medical orders because orders came from Petitioner (Note, the order were on approved procedures, and a part of the privilege contract.). Hospital and physician "refused to cover Dr. Benjamin's patients." Hospital refused to admit Petitioner's patients.

Defendant-Hospital refused to accept Petitioner's patients because Petitioner was physician for Maine State Employees Blue Select, a pre-paid health plan.

Hospital failed to take peer -review against White physicians. (App. 177-184)

Defendant hospital diverted Petitioner's patients to other physicians (App. 214)

Defendant-Hospital refused to send necessary personnel information to other hospital (Caribou, Maine Hospital). Defendant hospital knowingly sent false information to Maine State Medical Board. Maine State Medical Board placed a hold on information to Michigan Medical Board because an alleged case was pending against Petitioner. There was not any sixty (60) day notice mailed to Petitioner. (App. 215)

Defendant Hospital, The Aroostook Medical Center s the only hospital in the greater Presque Isle, Maine area, Monopolized part of the Medical practice and trade as follows:

(1) On or about September 15, 1993, TAMC, threatened Plaintiff to resign his medical privileges and release the Hospital and its physicins from legal liability or they would report false inforntion to the State Medical Board if he did not comply with their demands: (2) Defendant Hospital through its agentsand servants refused to honor Plaintiff's Medical Orders, and they failed to admit or treat his patients; (3) TAMC refused to assign Plaintiff to the list of physicians who performed routine EKG readings; (4) on November 9, 1993, TAMC seized and assigned three (3) of Dr. Benjamin's patients to other physicians; (5) Again, on December 31, 1993, TAMC "reassigned" all of Dr. Benjamin's in-patient hospital patients to other physicians; (6) TAMC ordered Dr. Benjamin not to admit new patients; (7)

previously, TAMC's Caucasian physicians refused to cover Plaintiff's patients; (8) TAMC further stated that Dr. Benjamin's patients would have to obtain services of other physicians in order to be treated at TAMC; (9) and, Plaintiff was stripped of all his medical privileges at TAMC. (App. 166 - 168)

In the instant case, all the internal medicine specialists at Defendant Hospital boycotted Plaintiff. They sent copies of their statements to Defendant Hospital and its operating departments wherein they announced they would not "cover Dr. Benjamin's patients. This demonstrated behavior continued for upwards of six (6) months.

TAMC and its family of privilged physicians refused to deal with Dr. Benjamin on any professional medical level, e.g., insubordination of nursing care personnel in terms of executing physicians orders, refused to share or assign him to routine medical duties such as reading of EKG reports, Dr. Benjamin is a Certified Fellow of the National Board of Internal Medicine, graduate of Howard University School of Medicine, and simultaneously held licenses to practice Medicine in four states, California, Connecticut, Minnesota and Maine. TAMC, through fraudulent pretence reassigned his patients to other physicians. TAMC refused to treat or service the sick, disabled infirm and elderly because they consulted with Dr. Benjamin on their medical problems, and finally, TAMC barred Dr. Benjamin from entering the Hospital grounds and they even notified the Presque Isle Police Department.

ANITITRUST INJURY FACTS

Defendant injured Petitioner and his patients as follows: The alleged combination consisted of Defendant hospital, its agents, servants and associated physicians. Thsi combination took from Plaintiff his right to treat patients in all respects. They took his right to have patients receive out-patient tests as well as

in-patient test, x-rays, and all forms of health investigative techniques; they took his freedom of counsel and consultation with both patients and health personnel, and they damaged him with lies to the State Medical Board and the National Practitioner Data Bank. They issued false information to patients, news media, the police and anyone who would listen. They stripped him of all clinical priveleges and posted their deeds throughout the halls of the hospital. They contacted his third-party insurance payers such as Medicare and told them that Dr. Benjamin was billing his patients for work he did not perform. The injury and the insults were very damaging. The conduct of Defendants interfered with the natural flow of interstate commerce. This conduct had and has by its "nature" and "character", a "monopolistic tendency."

Defendant Hospital reported false information to the State Board. They said Plaintiff was unavailable and had left town. Defendants knew that on the morning of November 8, 1993, their own employee, Teresa Case, R.N., talked with Dr. Benjamin on the floor of the Progressive Care Unit. Defendant further knew that Dr. Jones saw Dr. Benjamin at TAMC and Plaintiff "was on the floors writing orders on patients...," so wrote Dr. Jones on November 12, 1993 referring to November, 10, 1993. (App. 208-214) Dr. Jones then and there discusses Dr. Benjamin's presence with Dr. Wood and Mr. Ginty, Assistant Admistrator. Dr. Jones also discussed the matter with Gordon Smith, Medical Staff Attorney. Dr. Jones had reference to November 10th, Defendant Hospital also knew that on November 8, 1993, Dr. Benjamin and Otalene Furtek, R.N. saw and observed the same patient problem, to which, Dr. Benjamin stated the patient"... had urine that looked liked it was infected?" Ms. Furtek answered." ...yes her urine was cloudy..."

On January 4, 1994, TAMC, without cause or justification knowlingly reported false information to the

National Practitioner Data Bank by Stating that Dr. Benjamin was incompetent, negligent and he was guilty of malpractice.

Defendants do not have any evidence that Dr. Benjamin is incompetent, negligent or that he is a malpractitioner. On the contrary, Defendant has and had the following information to the contrary: Peer-Reviews by TAMC Emergency Department. Their own Emergency Department found that in review of Sixteen(16) cases in routine reviews, the "care" was "appropriate" in fourteen (14) cases. 2) The TAMC Tissue and Blood Utilization Committee reported ten (10) peer-revies, eight (8) reviews were reported "appropriate" outcome. 3) The Burn Committee reported six (6) peer reviews. The Outcome was 100% "managed appropriately." 4) The Medical Department Review Committee reported that in fifteen (15) routine reviews, the "care" was "appropriate" in thirteen (13) case. 5) The Infection Control Peer-Review Committee performed eight (8) reviews. The report was (100%) managed appropriately; 6) Surgery Department reported one (1) for review-The outcome was positive.

In fifty-eight(58) Peer-Reviews, the Defendant Hospital did not label any performance or incidents by Dr. Benjamin as incompetent, negligent or mal-practice. [For detail statement of the facts as allegations of the pleading Appendix](App. 155-164)

SUMMARY JUDGMENT STANDARD

Anderson v. Liberty Lobby, 477 U.S. 242, holds that: "Summary judgment will not lie if the dispute about a Material fact is "genuine", that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and determine the truth of the matter but to

determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is as to whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." p.p. 247-252.

Under Rule 56(c) of the Federal Rules of Civil Procedure, Summary Judgment should be entered only when the pleadings, deposistions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, (Poller v. Columbia Broadcasting System 368 U.S. 464 (1962). The purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try. In the instant case there were at least 200 controverted issues of fact in the three complaints.

Summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, (Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 22 L Ed 2658, 89 S Ct.

The case before the District Court an Anti-trust case plus an issue of falsity of the reports. The Health Care Quality Act (HCQIA) does not immunize false information, nor misuse of medical peer review process nor concerted action taken for anti-competitive purposes, (Pagano v. Oroville Hospital, 145 F.R.D. 683 (E.D. Cal. 1993); Section 11111 (a)(2) offers protection for those providing information to Professional Review Bodies, "... unless such information is false and the person providing it knew that it was false." The January 4, 1993 report to the National Practitioner Data Bank was false. The false information was also transmitted to the Maine Board of Registration for Medicine.

ARGUMENT

In the instant case the Court has overlooked or misapprehended Appellant's Sherman Anti-Trust presentation. Appellant contends that Defendant-Appellees committed per se violation of the Sherman Anti-Trust Act, and the "Rule of Reason" is not applicable to justify refusals to deal which are themselves a violation of Anti-Trust law, i.e., (crimes).

There is not a "rule of reason" for crimes. As a group, Defendant-Hospital and Physicians formed a group boycott against Appellant. There was a concerted refusal to deal with Appellant. The Hospital tried to persuade Appellant to leave the Hospital. Defendants formed a combination designed to influence his medical practice and deprive him of all hospital patients. This group boycott and refusal to deal constituted a per se violation of Section One of the Sherman Act (l5 USCS 1), (See Times-Picayune Publishing Co. v. United States(1953) 345 U.S. 594, 97 L Ed 1277, 73 S Ct. 872; Klor's Inc. v. Broadway Hale Stores, Inc. (1959) 359 U S 207, 3 L Ed 2d 741, 79 S Ct 705. In Klor's Inc. v. Broadway-Hale Stores, Inc. the Court pointed out that a group boycott which interferes with the natural flow of interstate commerce and has by its nature and character a monopolistic tendency is violation of the Sherman Act(lS USCS 1,2), notwithstanding that its victim is a single person whose business is so small that his destruction makes little difference to the economy. Monopoly can thrive by the elimination of such small business men one at a time, as it can by driving them out in large groups.

When the defendant Internists Dr.'s Stephen Wood, Dr. Walsh, Dr. Rohe, Dr. Silber started not covering Dr. Benjamin's patients on or about July of 1993 this was not to promote Quality health care. Here the purpose of the boycott was to destroy Dr. Benjamin's hospital-related medical practice, and to drive him out of town. The exclusion was directly profit related, (Dalmo Sales Co. v. Tysons Corner Regional Shopping Center (1970, DC, Dist Col) 308 F Supp 988, affd on other grounds 139 App: 22, 429 F 2d 206).

A group boycott against consumers is per se illegal, Klor's Inc. v. Broadway-Hale Stores (1959) 359 US 207 3L Ed 2d 741, 79 S Ct 705. Such boycott gives rise to a cause of action under Sections 1 and 2 of the Sherman Act (1 5 USCS I and 2). When Defendant Doctors refused to "cover Dr. Benjamin's patients, they committed per se violations of the Sherman Act, and the Rule of Reason was not applicable to justify their refusals.

Appellant did receive professional injury. Appellant has expended approximately $50,000.00 of man hours in relocating from Maine to multiple locations. He has incurred legal expenses and attorney fees in excess of $40,000.04He has lost gross income in the approximate amount of $19,000.00 per month since January 1994. There are also other professional damages, e.g., pain and suffering and professional reputation and lost of goodwill and future development.

As of April 6, 1993, approximately fifty-four percent 54.3% or $57,320.00 of Appellant's medical Services were for treatment of Medicare and Medicaid patients. Thus, when Defendant-Appellees caused "Medicare" to investigate Appellant for "fraud and abuse," they defamed Appellant in the relevant market area by falsely stating that Dr. Benjamin had a medicare "program related conviction." (See Exhibit "UU", Appendix to Brief of Appellant). (App. 170-171)

Defendant-Appellees argue that "HCQIA Immunizes the defendant Against And-Trust Allegations." Such is not the case. The Health Care Quality Improvement Act (HCQIA) does not immunize misuse of medical peer review process or concerted actions taken for anti competitive purposes, (Pagano v. Oroville Hospital 145 F.R.D. 683 (E.D. Cal. 1993).

Defendant-Appellees' analysis of the Sherman-Anti Trust Act as applied to hospital-physician cases is faulty. In the case of(Brader v. Allegheny General Hospital et al 64 F. 3d 869 (3rd Cir. 1995), a physician brought action against hospital and other physicians alleging Sherman Act violations and breach of contract with respect to loss of staff privileges. The Court of Appeals held

that: (1) Complaint adequately alleged effect on interstate commerce (2) Complaint adequately alleged anti-trust injury; and (3) if hospital failed to provide physician with fair hearing on privileges, it would not be entitled to immunity under the Health Care Quality Improvement Act." (App. 240)

Monopolization claims cannot be resolved at the pleading stage, (Brader v. Allegheny General Hospital et al 64 F. 3rd 869, (3rd Cir. 1995). Market power is relevant to a claim of restraint of trade, (Brader v. Allegheny General Hospital et al 64 F. 3rd 869, (3rd Cir. 1995); Weiss v. York Hospital 745 F. 2d 786, 825 n. 67 (3d Cir. 1984, cert. den. 470 U.S. 1060).; Summit Health, Ltd. v Pinhas, 500 us. 322, 111 S. Ct., 1842, 1142 ed 2nd 366 (1991).

The mere exclusion of a single physician from a market is sufficient import on the market, (Fuentes V. South Hills Cardiology, 946 F 2nd 196 (3rd Cir. 1991); Boczar V. Manatea Hospital and Health system, 993 F 2d 1514, 1519, (Ilth Cir. 1993).

In the case of Alan H. Brader v. Allegheny GeneralHospital et al (64 F. 3rd 869 (3rd Cir. 1995) the Court held, "If a physician's allegations of failure of hospital to provide him with fair hearing procedure were true, hospital and other physicans would not be entitled to immunity under the Health Care Quality Improvement Act (HCQIA) for physicians loss of hospital privileges. (Health Care Quality Improvement Act of 1986, Sec.
412(a) 42 U.S.C.A. Sec. 11112(a)).

In the instant case Defendant Hospital did not provide Appellant Doctor Benjamin with fair hearing procedures.

- 1 - Defendant Hospital did not adhere to its own By-Laws in excluding Plaintiff. Defendant waited longer than thirty (30) days to make "corrective-action" report.

- 2 - Plaintiff was not interviewed prior to issuing the report.

- 3 - Appellant was not given timely notification of a hearing date nor the nature of the charges against him, and

- 4 - Defendant Hospital denied Appellant the right to legal counsel. (See Exhibit PP page 106, of Brief already submitted.(App. 240)

Restraints imposed by group refusals to deal are illegal per so, (Fashion Originator's Guild v. Federal Trade Com. 312 US 457, 85L Ed 949, 61S Ct 703; Times - Picayune Publishing Co. v. United States, 345 US. 594, 97 L Ed 2d 545, 78 S ct. 514; 103 U of Pa L Rev. 847, 845. The Anti-trust laws condemn the entry into a conspiracy directed at a single competitor, (Binderup v. Paths Exch, 263 U.S. 291, 68 L Ed 308, 44 S Ct. 96)

The Sherman Anti-Trust Act prohibits conspiracies in restraint of trade or attempts to monopolize aimed at injury or destruction of a single person such as Petitioner, (Binderup v. Path Exch. 263 US 291, 68 L Ed 308, 44 S Ct 96; Lorain Journal Co. v. United States, 342 US 143, 96 L Ed 162, 72 S Ct 181.)

The Court held that Petitiones did not make any showing of harm to competition either directly or by reasonable inference This holding is a misapprehension of harm to competition.

The advanced and better rulings are that "The mere exclusion of a single physician from the market is sufficient" harm to competion, (Fuentes v. South Hills Cardiology, 946 F. 2d 196 (3d Cir 1991). See also, (Brader v. Allegheny General Hospital, 64 F. 3d 869 (3rd Cir. 1995). Physician's allegations that hospital and other physicians prevented plaintiff from practice of vascular surgery in the relevant market and prevented other hospitals from employing granting menical privileges to him for purpose of competing with defendants and alleged that the conduct prevented competition within the relevant product

market within the relevant geographic market, were sufficient to state a claim of anti-trust injury. See also Boczar v. Manatee Hosps. and Health Sys., Inc., 993 F 2d 1514, 1519 suspending the physicians privileges "had the effect of restraining trade."

A key question in determining the hospital's and defendant's ability to cause restraint of trade be imposed, in violation of anti-trust law, is whether defendants had control over decision-making process, or ability to coerce or unduly influence the challenged decision, (Brown v. Presbyterian Health Care Services, 101 F. 3d 1324, 1335 (10th Cir. 1996).

There is a point to point relation between the factual and legal issues in Petitioners cases, and the foregoing cited cases on injury and restraint of trade.

Claims Under 42 U.S.C. 1981

The trial Court held that postformation contract conduct does not fall within the protection of the Statute, (Patterson v. McLean Credit Union, 491 U.S. 164, 176, 177 (1989). However, this case predated the 1991 Amendment.

The Appellate Court Stated that Petitioner "...failed to show that TAMC intentionally discriminated against him based on his race." This is a mistatement of the record. The Court rested its decision on the case of Ayala - Gerena v. Bristol Myers Squibb Co., 95 F 3rd 86, 95 (1st Cir. 1996). This was an employee discrimination case. Petitioner's case is a hospital priviliges case. There was not an employer employee relation between TAMC Hospital and petitioner. The four necessary elements is a employment discrimination are: (1) The claimant must state that he/she is "black or "non-white (2) that he/she is qualified for the position, (3) that he/she was denied the position, and (4) that the position remained open and was filled by a "white" person, (McDonnell Douglas Corp., v. Green, 411 US

792, 36 L Ed 2d 668, 93 S. Ct. 1817 (1973); Texas Department of Community Affairs vs. Bardine, 450 US 248 255 n8, 67L Ed 2d 207, 101 S Ct. 1089 (1981).

Given the facts averred, Appellant's race can be said to have been an actual or decisive reason behind the alleged discrimination. Rowlett v. Anheuser-Busch, Inc., 832 F. 2d 194, 201 (1st Cir. 1987).

Plaintiff Benjamin's complaint make clear that the adverse determination of his skill as a physician resulting from purported peer review proceeding has interfered with his contractual relationship with his patients and his potential contractual relationship with the hospital.

Under these circumstances, the complaint specifies facts to support a cause of action on which relief can be granted because defendants interfered with plaintiff Benjamin's contractual relations with his patients and the hospital through its racially discriminatory practices in violation of 42 U.S.C. 1981.

Exhibits found in Appendix to Appellant's Brief and Complaint details a preponderance of evidence of TAMC's intentional discrimination against him by reason of his race.

1. Exhbits B, C, D and E, TAMC physicians refused "to cover Dr. Benjamin's patients" for no valid medical-clinical reason. Also see TAMC's admission Exhibit "HHH" at page 6, "... TAMC (App. 177-184)Hospital did not require the said physicians to cover (App. 177-184) Dr. Benjamin's patients." RESPONSE: "Admitted."
2. See Exhibit "YY", Appendix to Brief of Appellant.: "The nurses were not told to harass other doctors like this." (Observation of disparate treatment, Teresa Case, R.N. Page 2 of her affidavit. (App. 185-187)

3. Plaintiff was not permitted to read EKG's (See Complaint, Page 10, also Exhbit "HHH", Admission to Question 27. See further Exhbit F, "electrocardiographic interpretation" is a TAMC approved privilege and procedure for Dr. Benjamin since November 10, 1992).
4. Twelve (12) of Dr. Benjamin's patients signed a verified complaint that "... the four(4) Caucasian staff internists ... failed and refused to 'cover Dr. Benjamin's patient,' and still refuses to cover and treat Dr. Benjamin's patients." These patients suffered a variety of debilitating illnesses, e.g. Congrestive Heart Failure, Hypertension, Hepatitis, Diabetes, Rheumatoid Arthritis and others. There was no medical-clinical reason why these patients should have been mistreated.
5. See Exhibit "QQ", Appendix to Brief of Appellant.: Patient Bernice Beals states under oath, "I believe for certainty, that Dr. Benjamin is being treated this way because he is a Black physician." (App. 188)
6. See Exhibit "RR", Appendix to Brief of Appellant, Affidavit of Mrs. Celia Chambers concerning care for her injured son. ""... the nurse ... would not help Dr. Benjamin." (App. 190)
7. In affidavit of Patient Georgie Davenport, Exhibit "SS", Appendix to brief of Appellant, she states: "... because I am a patient of Dr. Benjamin, I get very badly treated."
8. In Affidavit of Patient Joan Tweedie, Exhibit "TT", Appendix to brief of Appellant, she states: "I believe Dr. Benjamin is being discriminated against because I was refused services (by TAMC) as a result of being a patient of Dr. Benjamin." (App. 207)

Section 42 U.S.C. 1981(b) covers the performance of contracts under the Civil Rights. The Defendant-Appellee Hospital intentionally violated this law repeatedly. See pages 18 and 19 of the Complaint. The Hospital required Dr. Benjamin to give certain patients "medication orders before patients were admitted to his service." On the night February 27, 1993, TAMC required Appellant "To write non-emergency or acute patient orders earlier than the time required by the Hospital Bylaws," (See page 19 of Complaint).(App. 56-85)

On the night of February 27, 1993, said Hospital required nurses and aides to invade said Physician's medical discretion by having said nurses determine what orders to give patients, and what time or times to give and execute patient orders.

On the night of February 27, 1993, TAMC, through its Staff Physician, Stephen Wood, M.D., in the course and scope of his employment, performed mulitple personnel evaluations on Appellant at times and places outside a personnel evaluation setting, (Page 19 of complaint). (App. 56-85)

On April 1, 1993, Defendant Hospital's nurse, Jeanette McBurnie, in the course and scope of her employment as said nurse, failed and refused to carry our Plaintiff Physician's demand to prepare and discharge a patient.

On April 1, 1993, Defendant Hospital's nurse, Nancy Guerrette, in the course and scope of her employment as said nurse, failed and refused to carry out Plaintiff Physician's demand to prepare and discharge a patient.

Appellant, the lone Physician of Color at TAMC was intentionally subjected to different treatment by TAMC Hospital and is staff members with active participation of TAMC Hospital. The hospital is not performing its contract to care for patient

Res Judicata

The First Corcuit Court of Appeals held that "... Appellant's claim for malicious abuse of process is barred by the doctrine or resjudicata." Appellant, the Petitioner herein does not have a claim for "malicious abuse of process." Count Three of Petitioner's Complaint is Malicious Abuse of Report.

Malicious Abuse of Report and Abuse of Process are manifestly different legal theories not one theory described by different names.

(1) A malicious Abuse of Process occurs where one uses a legally issued process for some unlawful object, not the purpose it was intended for the law to effect, in short, a perversion or improper use, (Publix Drug Co. v. Breyer Ice Cream Co., 347 Pa 346, 32 A. 2d 413, 415; Merchants Collection Assn of Oakland, Inc., Cal., 7 C. 3d 94, 101 Cal Rptr. 745, 752, 496 P. 2d 817).

(2) Malicious Abuse of Reportis a crime under state and federal statutes, for a person knowing he has no privilege to do so, to falsify or otherwise tamper with public records with purpose to deceive or injure anyone or to conceal any wrong doing, (See Model Penal Code, Sec. 224. 4; 18 U.S.C.A. Secs. 1506, 2071, 2073).

Thus, when the Appellate Court used the term "Malicious Abuse of Process," the said Court at once introduced both facts and law no where found in evidence. This was an abuse of discretion because the Court assumed the parties and the issues were the same and further; that, the prior courts had adjudicated and ruled on the issues.

Res Judicata bars the relitigation of issues that were, or could have been, decided in a prior case. the case of Currier v. Cyr,

570 A. 2d 1205, 1208 (Me. 1990) is the current leading case on the doctrine of res judicata. The elements are as follows:

"(1) The same parties or their privies are involved in both actions;

(2) A valid final judgment was entered in the prior action; and,

(3) The matters present for decision now were, or might have been litigated in the prior action."

The Court misapprehended the facts of this instant case and the facts of the prior State Tort case, (Benjamin v. Aroostook Medical Ctr., Law Docket No. Aro-95-569 (Me. November 14, 1996).

Element One, Parties: The parties are not the same. In the State case, Dr. Benjamin, his mother, and his father, were the only plaintiff-parties. The Federal case, the instant case, was litigated in two stages. In the first stage the case was filed by eighteen (18) persons, including Dr. Benjamin.

Seventeen (17) of the plaintiffs were Dr. Benjamin's patients. The patients were dismissed from the proceedings. In the present, second stage of the case, the Appellant is the lone party.

In all cases the Defendant parties are substantialy the same, not exactly the same.

Element Two, Valid Judgment: A valid judgment was entered in the prior State Tort case.

Element Three, Prior Action Litigation: In the instant case the matters could not have been litigated in the State Tort case. The State Tort case was filed December 13, 1993, before the facts of the Federal case arose. The first stage of the present Federal case was filed January 7, 1994. The essential facts of the two cases were fundamentally different. The Federal case directly involved treatment of Appellant's entire patient population. On December 13, 1993, Appellant could not have anticipated Defendant-Hospital would ban of all patients so long as they were Associated with Dr. Benjamin. Clearly, Appellant could not be responsible for Action of Defendant Hospital, its

agents, servants and Board of Directors. In all matters Defendant Hospital selectively attacked the Plaintiff-Appellant and forced him to seek reddress in the Courts.

Thus, the instant cases are a far cry from the elements of Currier v. Cyr., 570 A. 2d 1205, 1208 (Me. 1990). The parties and the facts are not the same and, the present case by the timing and sequence of essential facts could not have been litigated in the prior, State Tort case.

The State Tort Case contained the following thirteen (13) counts, all of which accrued between September 15, 1993 and November 30, 1993:

(1) Libel and Slander, (2) Slander and Libel, (3) Libel and Slander, (4) Concrete Execution of Libel Plan, (5) Revocation of Hospital Privileges, (6) Extortion, (7) Abuse of Process, (8) Failure to Inform Plaintiff, (9) Property taking w/o Due Process Denial of Compulsory, (10) Process and Confrontation, (11) Denial of Equal Protection, (12) Denial of Due Process by Exceeding Time Limits, (13) Denial of Counsel

The Federal case contained the following five (5) counts, which accrued after the December 13, 1993 filing of the State Case. (Accrued between December 31, 1993 and October 26, 1995):

1. Monoply
2. Denial of Hospital Privileges
3. Malicious Abuse of Report
4. Peer Review as Restraint of Trade and Monoplozation of Practice.
5. Restraint of Trade.

Additionally, on or about January 4, 1994. The State Court judge issued an order stating that the Petitioners could not add new counts to the complaint of the State tort case.

In summary, the same parties or privies were not involved in both actions. The matters for decision in the cases were not the same. The issues in the Federal case could not have been litigated in the prior State action, because the Federal causes of Action post dated the filing of the prior State action. Therefore, the Appellate Court holding of Res judicata is based upon a prejudicial assumption of facts not in evidence.

STATE-ACTION

In the instant case, the Defendant hospital by state statue, 24 M.R.S.A. 2506, was compelled to report Petitioner's Suspension of hospital privileges to the State Board of Registration. This was color of law. In Adickes v. S.H. Kress & Co., 398 U.S. 144, 170; 90 S.Ct. 1598, 1615; 26 L.Ed.2d 142 (1970), the United States Supreme Court held that a state is responsible for the act of a private party when the state, by its law, compels the act. The Supreme Court added: "When the state has commanded a particular result, it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in it" at 170, 90 S.Ct. at 1615, quoting Peterson v. City of Greenville, 373 U.S. 244, 248; 83 S.Ct. 1119, 1121, 10 L.Ed.2d 323 (1963).

Defendants were compelled by Maine state law, Title 24 M.R.S.A. 2506., to report their peer review. Thus, Defendants came to wear the state granted 'mantle of authority and were as such bathed in the waters constitutional obligation. Under Adickes, it is therefore apparent that a mandatory provision of the statute provides the requisite state action in this case. (See Appendix, Amended Complaint)

There are several cases holding that a private person may be a state actor. See the leading case of Edmonson v. Leesville Concrete Co., (1991). 500 U.S. 614, 114 L. Ed. 2d 660, 111 S. Ct. 2077. This was a of jury selection in a civil case . State action was based on the public function or symbolic relation test.

In the Sixth Circuit, a Michigan Statute reporting of suspected child abuse. A private social worker reported defendant's conduct to the State. In People of the State of Michigan, Farrow, 455 N.W. 2d 325 (Mich. App. 1990) this was held to be state action on the compulsion test.

In the Seventh Circuit, in Illinois a bank was held to be a governmental actor, for due process purposes so as to make the government responsible for a bank "hold" on a personal check, Drury v. Horizon Sav. Bank, 762 F. Supp. 235 (N.D. Ill. 1991).

In the Third Circuit, a private detective acts "under the state of Pennsylvania "Professional Thieves Act," within the purview of 42 U.S.C.A. 1983, De Carlo v. Joseph Horne & Co., 251 F. Supp. 935 (1966).

In the First Circuit, in the case of Jackson v. Faber, 834 F. Supp. 471 (D. ME 1993) it was held that privates parties who conspire with State officials could be sued under 42 U.S.C.A 1983.

In the instant case, the Defendant Hospital reported false information to the National Practitioners Data Bank, pursuant to a State compulsion statute. The Defendant Hospital reported that the Petitioner was in competent, negligent and a mal-practitioner. Defendant denied the allegation before the Court, and then pleaded truth as an affirmative defense. This created an issue for a jury trial. The First Disctrict Court held that the Defendant Hospital was a private actor.

There are also other examples of private persons as state-actors, e.g., West v. Atkins, 108 S Ct. 2250 (1988); Lugar v. Edmondson Oil Co., 457. U.S. 922 (1982) and Conner v. Donnelly, 42 F 3d 220 (4th Cir. 1994).

In the case at Bar, the trial Court failed to consider whether Defendants acted under State compulsion. Title 24 MRSA 2506, Compels a non-profit hospitals to report revocation, suspension, limitation or termination of hospital privileges together with pertinent information relating to that action. In so reporting, the hospital was a state actor.

The weight of authority is that a hospital, in denying a physician privileges, acts under color of law, and is therefore, a state actor. See the following cases: Anton v. San Antonio Community Hospital, 19 Cal 3d 802, 141 Cal Rptr 442, 567 P2d 1162; Re Zaman (1985 285 SC 345), 329 SE 2d 436; Johnson v. Greater Southeastern Community Hosp. Corp., (1991) DC Dist (1992, ND GA) 785 F. Supp. 989; Christhilf v. Annapolis Emergency Hospital Assoc., (CA4Md) 496 F2d 174, (Cal 789 F. Supp 427) 552 F2d 1070; Lawler v. Eugene Wuesthoff Memorial Hospital Assoc. (1986, Fla App D5) 497 So. 2d 1261; Nashville Memorial Hospital v. Brinkley (Tenn) 534 SW2d 318; Silver v. Castle Memorial Hospital, 52 Hawaii 475, 497 P2d 564, cert den 409 US 1040, 34 Led. 2d 500, 93 Sct. 517; Storrs v. Lutheran Hospitals and Homes Soc. (Alaska) 609 P2d 24; Rosenblit v. Superior Court, 231 Cal App. 3d 1434, 282 Cal Rptr 819 (1991).

In the case of Ascherman v. San Francisco Medical Soc., the Court concluded that "the unmistakable trend of the judicial and legislative enactments... supports the principle that a private party may not deprive a physician of staff privileges without granting him minimal due process of law protection," Ascherman v. San Fransico Medical Soc., 39 Cal App. 3d 623, 114 Cal Rptr. 681.

It has been held to be state action in the restriction or termination of a physician's staff privileges in the following cases: Citta v. Delaware Valley Hospital (1970, DC pa) 313 F. Supp. 301; Sams v. Ohio Valley General Hospital Assoc. (1969, CA4 Wva) 413 F2d 826; Harron v. United Hospital Center, Inc. (1974, DC Wva) 384 F Supp 393; Applebaum v. Board of Directors of Barton Memorial Hospital (1980, 3rd Dist 104 Cal App 3d 648, 163 Cal Rpt. 831; Chiaffitelli v. Dittmer Hospital, Inc., (1971, CA6 Ohio) 437 F2d 429; O'Neill v. Grayson County War Memorial Hospital (1973, CA6 Ky) 472 F2d 1140; Suckle v. Madison General Hospital (1973, DC Wis) 362 F Supp 1196,

499 F2d 1364; Klinge v. Lutheran Charities Assoc. (1975, CA8 Mo) 523 F2d 56; Laje v. R.E. Thomason General Hospital (1982, CA5 Tex) 665 F2d 724, 670 F2d 181.

Where racial discrimination has been alleged by the physician, the Courts have found state action in several cases, eg., Eaton v. Grubbs (1964, CA4 NC) 329 F2d 710; Simkins v. Moses H. Cone Memorial Hospital (1963, CA4 NC) 323 F2d 959, cert den 376 US 938, 84 S. Ct. 793; Smith v. Hampton Training School for Nurses (1966, CA4 Va) 360 F2d 577; Cypress v. Newport News General and Nonsectarian Hospital Assoc. (1967 CA4 Va) 375 F2d 648; Stanturf v. Sipes (1964, CA8 Mo) 335 F2d 224, cert den 379 US 977, 13 Led 2d 567, 85 S. Ct. 676; Doe v. Charleston Area Medical Center, Inc., (1975, CA4 Wva) 529 F2d 638.

Color of Law in Licensing; Holmes v. Silver Cross Hospital (1972, DC Ill) 340 F Supp 125; Sokol v. University Hospital Inc., (1975, DC Mass) 40 F Supp 1029.

The Court erred in its ruling on what constitutes "state action". The Defendant Hospital and the Defendant-Physicians acted under color of both State and Federal Law. The relevant Federal Law was and is the Health Care Quality Improvement Act of 1986, (42 U.S.C. 11111 et seq.) Defendant's claim immunity under this statute, however this statute expressly excepts and exempts "any law ...relating to the civil rights of any person including the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq.

There is consensus in several circuits over the question of a private hospital as a state actor. However, four circuits, the First, Second, Third and Eighth Circuit tends to hold a lack of State-action.

The Seven Circuits exhibiting a tendency to find state-action in hospital cases are as follows: (1) Fourth Circuit, (2) Fifth Circuit, (3) Sixth Circuit, (4) Seventh Circuit, (5) Ninth Circuit, (6) Tenth Circuit, and (7) Eleventh Circuit.

Each circuit has adjudged and found state-action in some cases and non-state-action in other cases, however there is a definite spilt between the circuits as above-stated.

On the wider issue of State-action by private-persons the United States Supreme Court has shown a recent tendency to find state-action in such cases as Edmondson v. Leesville Concrete Co., (1991) 500 U.S. 614, 114 L Ed 2d 660, 111 S. Ct. 2077; West v .Atkins, 108 S. Ct. 2250 (1988); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Adickes v. S.M. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L. Ed 2d 142; Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L Ed 2d 45 (1961); Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L Ed 1152 (1953); and, Marsh v. Alabama, 326 U.S. 50, 66 S.Ct. 276, 90 L. Ed 265 (1946).

A sample of leading cases by the Federal Circuits are as follows:

STATE-ACTION

Fourth Circuit: Hartsell v. Duplex Products, Inc., 895 F. Supp. 100 (WD NC 1995); Re: Zaman (1982, 85 SC 345), 329 S.E. 2d 436; Conner v Donnelly, 42 F 3d 220 (4th Cir 1994) ; Cohn v. Wilkes General Hosp. (1988, WD NC) 127 FRD 117; Lugar v. Edmondson Oil Co., Inc., 102 S. Ct. 2744(1982); Harron v. United Hospital Center, Inc., (1974 DC W.Va.) 384 F Supp. 1994; Christhilf v. Annapolis Emergency Hospital Asso., (1974, CA4 Md.) 496 F2d 174, (Ca 4 Md.) 552 F2d 1070; Doe v. Charleston Area Medical Center, Inc., (1975 CA4 W.Va.) 529 F2d 638; Large v. Reynolds (1976, DC W Va) 414 F Supp 45; Duffield v. Charleston Area Medical Center, Inc., (1974 Ca 4 W.Va.) 503 F2d 512; Cypress v. Newport News General and Non Sectarian Hosp. Assn (1967 CA4 Va) 375 F2d 648; Smith v. Hampton Training School For Nurses (1996 CA4 Va) 360 F2d 577; Sams v. Ohio Valley General Hosp. Asso. (1969, CA4 W.Va.) 413 F2d 826; Eaton v. Grubbs (1964, CA 4 NC) 329 F2d 710; and, Simkins v. Moses Cone H. Memorial Hosp. (1963, CA4 N.C.) 323 F2d 959, cert den 376 US 938, 11 L Ed 2d 659, 84 S.Ct. 793.

Fifth Circuit: Caine v. Hardy (1989, SD Miss) 715 F Supp 166; Laje v. R.E. Thomason Gen. Hosp (1982, CA5 Tex) 655 F 2d 724, 670 F2d 181; Mary v. Sorel, 558 F2d 303, 305-306 (5th Cir. 1977); Greco v. Orange Memorial Hosp. Corp., 513 F2d 873, 880-881 (5th Cir. 1975); and Pollock v. Methodist Hosp., (1975 DC La) 392 F2d 393.

Sixth Circuit:

Manion v. Evans (1993, CA Ohio) 986 F2d 1036; Lie v. St. Joseph Hosp. (1992 CA6 Mich) 964 F2d 567; Le Masters v. Christ Hosp., Inc., (1991, SD Ohio) 791 F Supp 188; Goldsmith v. Harding Hosp. Inc., (1991, S.D. Ohio). 762 F Supp 187; O'Neill v. Grayson County War Memorial Hosp. (1973, Ca 6 Ky) 472 F2d 1140; Chiaffitelli v. Dettmer Hosp. Inc., (1971, CA6 Ohio) 437 F2d 429; Meredith v. Allen County War Memorial Hosp. Comm, (1968, CA6 Ky) 397 F2d 33; and Newson v. Vanderbuilt Univ. 453 F Supp. 401 (1978).

Seventh Circuit:

Harris v. Bellin Memorial Hosp. (1994, CA7 Wis) 13 F3d 1082; Bearden v. Humma Health Plan (1992, ND Ill) 1992 US Dist Lexis 14306-7 CA); Drury v. Horizon Savings Bank. 762 F Supp 235 (ND Ill 1991); Musso v. Suriano, 586 F2d 59, 62-63 (7th Cir 1978); Suckle v. Madison Genl. Hosp., (1973 DC Wis) 362 F Supp 1196, (CA 7 Wis) 499 F2d 1364; and, Holmes v. Silver Cross Hospital (1972) D.C. Ill). 340 F Supp. 125).

Ninth Circuit:

Pagano v. Oroville Hosp. (1993, E.D. Cal) 145 F.R.D. 683; Fobbs v. Holy Cross Health System Corp., (1992, ED Cal) 789 F Supp 1054; Smith v. Ricks (1992 ND Cal) 798 F Supp 605; Teasdale v. Marin Genl. Hosp. (1991 ND Cal) 138 FRD 691; Rosenblit v. Superior Court, 231. Cal App 3rd 1434, 282 Cal Rptr 89. (1991); Patrick v. Burget, 108 S. Ct. 1658 (1988), 486 U.S. 94, 100 L Ed 2d 83; Anton v. San Antonio Community Hospital, 19 Cal 3rd 802, 141 Cal Rptr. 442, 567 P 2d 1162; Applebaum v. Board of Directors of Barton Memorial Hosp., (980 3rd Dist) 104 Cal App. 3rd 648, 163 Cal Rptr 831; Asckerman v. San Francisco Medical Society, 39 Cal App 3rd

623, 114 Cal Rptr 681; Silver v. Castle Memorial Hosp. 52 Hawaii 475, 497 P 2d 564, cert den 409 US 1048, 34 L Ed 2d 500, 93 S. Ct. 517; Storrs v. Lutheran Hosp. & Homes Soc. (Alaska) 609 P2d 24; Taylor v. St. Vincent's Hosp., 523 F2d 75, 77 (9th Cir. 1975) cert den 424 U.S. 948, 96 S. Ct. 1420; Watkins v. Mercy Hosp., Center 520 F2d 894, 896, (9th Cir. 1975); and Ascherman v. Presbyterian Hosp. 507 F2d 1103, 1105 (9th Cir. 1974).

Tenth Circuit:

Decker v. IHC Hosp. Inc., (1992, CA 10 Utah) 982 F2d 433; Lee v. Colorado Dept of Health, 718 P2d 221 (Colo 1986); Atkins v. Lanning, (DC Okla) 415 F Supp, 186, 188; and Ward v. St. Anthony's Hosp., 476 F2d 671, 675 (10th Cir 1973).

Eleventh Circuit:

Stutson v. U.S., 116 S.Ct. 600 (1996); Robles v. Humana Hosp., Cartersville (1992 ND Ga) 785 F Supp. 989; Bolt v. Halifax Hosp. Med. Center, 891 F2d 810, (11th Cir) cert den 495 US 924 (1990); and, Lawler v. Eugene Wuethoff Memorial Hosp. Assn., (1986 Fla app. D5) 497 So2d 1261.

NON STATE-ACTION CIRCUITS

First Circuit:

Modaber v. Culpeper Mem. Hospital, 674 F2d.1023 (1982); Onat v. Penobscot Bay Medical Center, 574 A 2d 872, 874 (ME 1990). Sokol v. University Hosp. Inc., (1975 DC Mass) 402 F Supp 1029); Bricker v. Sceva Speare Memorial Hosp. 339 F Supp. 234 (1972); and, Mendez v. Belton, 739 F 2d (1st Cir 1984).

Second Circuit:

Johnson v. Nyack Hosp., (1992 CA2 NY) 964 F2d 116; Schlein v. Milford Hosp., Inc., 561 F2d 427, 429 (2nd Cir 1977); Barrett v. United Hosp., 376 F Supp 791 (1974); Mulvihill v. Julia L. Butterfield Memorial Hosp., (1971 DC NY) 329 F Supp 1020.

Third Circuit:

Okusami v. Psychiatric Inst. of Washington, Inc., (1992) 295 US App D.C. 58, 959 F2d 1062; Johnson v. Greater South

West Community Hosp. Corp., (1991) D.C. District Col, 789 F Supp 427; American Hosp. Asso. v .Bowen, 834 F2d 1037 (DC Cir 1987); Balkisson v. Capitol Hill Hosp., (1989, Dist Col App) 558 A.2d 304; Dworkin v. St Francis Hosp. Inc., (1986 Del Sup.), 517 A.2d 302, App. den w/o op(1987, Del Sup.) 521 A.2d 649; Hodge v. Paoli Memorial Hosp., (1978, CA3 PA) 576 F2d 563; Ozlu v. Lock Haven Hosp., (1974, DC Pa) 369 F.Supp. 285, Affd. without opposition (CA 3 PA) 511 F2d 1395; Shulman v. Washington Hosp. Center (1970 DC Dist Col) 319 F.Supp. 252; Acosta v. Tyrone Hosp., (1976, DC Pa) 410 F Supp. 1275; Samont v. Hannimann Med Col and Hosp., 413 F Supp 434 (1976); Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856, 6 L Ed 2d 45 (1961); Hodge v. Paoli Memorial Hosp., 576 F2d 563, 564 (3rd Cir 1978) (per curiam); Citta v. Delaware Valley Hosp., (1970, DC Pa) 313 F.Supp. 301; Wei v. Bodner (1989, DC NJ) 127 F.R.D. 91; and Weiss v. York, 745 F2d 786 (1984).

Eight Circuit:

Islami v. Covenant Medical Center, (1992 ND Iowa) 822 F.Supp 1361; Brisco v. Bock, 540 F2d 392, 395 (8th Cir. 1976); Kling v. Lutheran Charities Asso., (1975, CA 8 Mo) 523 F2d 56; Stanturf v. Sipes (1964 CA 8 Mo) 335 F2d 244 cert den 379 US 977; and Hodgson v. Lawson (1976, CA8) 542 F2d 1350, without citing 42 USCS 1983 or the 14th Amendment.

CONCLUSION

This petition raises important issues of judicial fairness in terms of the necessity of supervision and attention to legal procedural detail; and, issues on the doctrine of state action or color of law and private hospitals. There is a lack of clear consensus in the area of state action. The United States Supreme Court has not as yet articulated an opinion on state action and a private hospital. The appellate Court's use of Res Judicata where it is not warrented, the misapplication of anti-trust standards and

the Court's misapprehension of 42 U.S.C. Sect. 1981 make this case ripe for reversal. Certiorari must be granted in order to give judicial balance and clarity to these areas of law.

This petition should be granted on all issues.

Respectfully Submitted, 8-7-97

/s/_____
James Benjamin, Jr., M.D., Pro Se

Dated: 10-12-97 James Benjamin JR M.D.

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United States Court of Appeals
For the First Circuit

No. 96-2047

James Benjamin, Jr., M.D.,
Plaintiff, Appellant,

v.

THE AROOSTOOK MEDICAL CENTER, INC., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Morton A. Brody, U.S. District Judge]

Before

Selya, Cyr and Boudin,
Circuit Judges.

Jams Benjamin, Jr., M.D. on brief pro se.
Christopher D. Nyhan, Penny Littell, and Preti, Flaherty, Beliveau & Pachios, LLC on brief for appellees.

May 9, 1997

Per Curiam. Appellant James Benjamin, Jr., M.D. appeals from the decision of the district court granting summary

judgment to appellees, The Aroostook Medical Center ("TAMC") and various physicians associated with TAMC. After carefully reviewing the record and the parties' briefs, we affirm the district court's judgment for essentially the reasons states in its published opinion reported at Benjamin v. Aroostook Medical Ctr., 937 F. Supp. 957 (D.Me. 1996). We add the following comments.

1. Appellant's claim that the individual appellees conspired to restrain trade in violation of 15 U.S.C. 1 is analyzed under the "rule of reason." See Flegel v. Christian Hosp., Northeast-Northwest, 4 F. 3d 682, 686 (8th Cir. 1993) (the courts of appeals usually review the denial or revocation of hospital privileges, especially in cases involving individual determinations of incompetence, under the rule of reason) (citing cases). We agree that the appellant did not make any showing of harm to competition, either directly or by reasonable inference. Thus, summary judgment was appropriate. See Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1435 (9th Cir.), cert denied, 116 S.Ct. 515 (1995).

2. Because the facts upon which appellant bases his claim of discrimination concerning his contract with TAMC occurred after 1991, the claim is cognizable under 42 U.S.C. 1981. See 1981(b). After reviewing the record and appellant's arguments on appeal, however, we find that appellant has failed to show that TAMC intentionally idscriminated against him based on his race. See Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F. 3d 86, 95 (1st Cir. 1996).

3. Appellant's claim of malicious abuse of process is barred by the doctrine of res judicata. Under Maine law, res judicata bars the relitigation of issues that were, or could have been, decided in a prior case if: "(1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters present for decision now were, or might have been, litigated in the prior action." Currier v. Cyr, 570 A, 2d 1205, 1208 (Me. 1990).

In 1996, the Maine Supreme Judicial Court, on appeal from a lower court's decision adverse to appellant, held that

TAMC was immune from appellant's state law tort claims concerning the peer review process. Benjamin v. Aroostook Medical Ctr., Law Docket No. ARO-95-569 (Me. November 14, 1996). In so holding, the court relied on the federal Health Care Quality Improvment Act, 42 U.S.C. 11101-11152, and the state Health Security Act, 24 M.R.S.A. 2501-2511. Appellant's claim in the case at hand, although not precisely articulated, also centers on the peer review process -- i.e., the filing by TAMC of allegedly false reports with the National Practitioner Data Bank and the Maine State Medical Board.

Res judicata applies to the case at hand because the parties to both the state and federal actions are the same and the Supreme Judicial Court's decision is a valid final judgment. Further, there is no reason why appellant could not have litigated in the state action the claim he now presents. The fact that the state action was premised on state tort law while the federal case based on the Constitution does not matter. Currier, 570 A. 2d at 1205.

For the foregoing reasons, the judgment of the district court is affirmed.

ENTERED ON DOCKET

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMES BENJAMIN, JR., M.D. Plaintiff, v. THE AROOSTOOK MEDICAL CENTER, et al. Defendants.	Civ. No. 95-CV-253-B

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge.

Plaintiff, Dr. James Benjamin sues his former employer The Aroostook Medical Center, Inc. CTAMC" or "the hospital"), a non-profit hospital located in northern Maine, numerous doctors and other staff members employed at TAMC. Dr. Benjamin filed a five-count Amended Complaint alleging, among other things, violations of the Sherman and Clayton Acts, 15 U.S.C. 99 1, 2, 14, 15, 24, 26, racial discrimination under 42 U.S.C. 1981 and 1983, and malicious abuse ofreport. Dr. Benjamin proceeds pro se.

Defendants have filed numerous motions in response, including a Motion to BifUrcate, several Motions in Limine and a Motion for Summary Judgment. The Court addresses only the Defendants' Motion for Summary Judgment as it is dispositive. For the reasons that follow the Court grants that Motion.

I. Background

Plaintiff, Dr. Benjamin is a physician of African-American descent, licensed to practice medicine in California, Connecticut, Maine and Minnesota. He maintains a specialty in internal medicine, and is certified by the American Board of Internal Medicine as having a "Specialty of IntemalMedicine." Dr. Benjamin previously enjoyed various staff privileges at TAMC, and the loss of those privileges resulting from alleged discriminatory behavior form the basis of this suit. At the time of his termination Dr. Benjamin was the sole African-American physician at TAMC.

TAMC, a nonprofit hospital located in Presque Isle, allegedly maintains "a dominant position within the health care services market in the Presque Isle, Maine area." (Compl.,'l[V.) Neighboring hospitals in Caribou and Houlton are said to be inconvenient to Presque Isle residents. TAMC maintains a staff of approximately forty-five physicians, and only permits physicians with proper privileges to treat patients in its facilities. TAMC receives both state and federal fUnds for its operations, as well as various tax benefits due to its status as a charitable organization.

In February of 1992, Dr. Benjamin applied for staff privileges at TAMC. He was neither awarded, nor denied full privileges. Rather the hospital granted him a "provisional appointment," with the intention of reviewing the competency and proficiency of his work before making a decision as to permanent hospital privileges. Dr. Benjamin, however, maintains that his qualifications merited full staff privileges at the time of his original application, and that Caucasian applicants with comparable qualifications were awarded six month trial periods, while his lasted only about six weeks. (Compl. at fl XXXVIII.)

Dr. Benjamin claims that discrimination ultimately led to the termination of his clinical privileges in January of 1994. In September of 1993, TAMC first asked Dr. Benjamin to voluntarily resign his hospital privileges. Dr. Benjamin, however,

refused. He remained at the hospital, but was allegedly subjected to continual discriminatory treatment by the TAMC staff. Dr. Benjamin claims TAMC discriminated against him in relation to medication orders, assigned nursing responsibilities, and personnel evaluations. In November, 1993, for example, the hospital allegedly failed to honor several discharge orders, and also allegedly unjustly refUsed to admit and treat one of his patients. TAMC also allegedly reassigned several of Dr. Benjamin's patients to other physicians. As Dr. Benjamin continued to admit patients, the hospital continued to reassign them. Later he was ordered to stop admitting new patients entirely, and ultimately had his privileges suspended upon the recommendation of TAMC's Medical Staff Executive Committee. According to Dr. Benjamin, TAMC never substantiated the grounds for his suspension or his later termination.

This alleged discrimination by TAMC staffmembers, Dr. Benjamin contends, did not end with the termination of his privileges at TAMC. When Dr. Benjamin applied for a job with the Cary Medical Center in Caribou, Maine, Cary required certain letters of reference and files from TAMC as part of the application process. TAMC refUsed both requests. Additionally, TAMC filed reports with the National Practitioner Data Bank and Maine State Board of Licensure in Medicine that allegedly unjustly criticized Dr. Benjamin's performance at TAMC. Dr. Benjamin challenges the veracity of these reports, and alleges that TAMC knew this information to be false.

II. Summary Judgment

A. Standard

Summary judgment is appropriate in the absence of a genuine issue of any material fact, when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Thus it is axiomatic that summary judgment must be denied when disputes remain as to consequential facts -facts upon which

the outcome may rely. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Menard v. First Sec. Servs. Corp., 848 F.2d 281, 285 (1st Cir. 1988). Facts may be drawn from "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." Fed. R. Civ. P. 56(c). An issue is genuine, for summary judgment purposes, if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. A material fact is one which has "the potential to affect the outcome of the suit under applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). The Court views the record in the light most favorable to the nonmoving party. McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995).

Summary judgment is also appropriate when the nonmoving party fails to put forth sufficient evidence to establish an element essential to its claim. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). When the moving party demonstrates "an absence of evidence to support the nonmoving party's case," the burden shifts to the nonmovant to establish the existence of a fact that is both material, as well as genuine. Id. Thus the nonmovant "may not rest upon mere allegations, but must adduce specific, provable facts demonstrating that there is a triable issue." Brennan v. Hendriaan 888 F.2d 189, 191 (1st Cir. 1989). In the absence of such evidence, the moving party will prevail. Celotex, 477 U.S. at 325.

B. Plaintiffs Evidence

Before analyzing the various counts below, the Court first addresses a fatal defect which permeates Plaintiffs entire response: a lack of proper evidence and substantiation. Plaintiffs response, and pleadings generally, almost wholly lack citation to necessary evidentiary sources. Dr. Benjamin cites little to no relevant affidavit testimony, other than several references to his own affidavit, no pertinent deposition testimony, or any answers to interrogatories substantiating his claims.[1] Consequently his claims represent no more than bare assertions insufficient to survive summary judgment. J. Geils Band Employee Ben. Plan v. Smith Barney Shearson. Inc., 76 F.3d 1245, 1251 (Ist Cir.), petition for cert. filed, 65 USLW 3001 (Jun. 19, 1996) (No. 95-2050) ("Neether 'conclusory allegations, improbable inferences, and unsupported speculation,' nor '[b]rash conjecture coupled with earnest hope that something concrete will materialize, is [1 sufficient to block summary judgment.") (internal citations omitted); Griggs-Ryan v. Smith, 904 F.2d 112 (Ist Cir. 1990) ("Neether wishful thinking nor 'mere promise[s] to produce admissible evidence at trial,' nor conclusory responses unsupported by evidence, will serve to defeat a properly focused Rule 56 motion.") (internal citations omitted).

While his twenty-one page Response to Defendants' Motion for Summary Judgment contains six references to his accompanying exhibits, these documents are of little evidentiary value, both in substance and form. For example, Dr. Benjamin's first exhibit, his own affidavit, is filled with unsubstantiated and hearsay-type evidence that would be inadmissible at trial, and is thus excluded for the purposes ofsummaryjudgment under Fed. R. Civ. P. 56(e). See Horta v. Sullivan. 4 F.3d 2, 8 (Ist Cir. 1993). Dr. Benjamin's other exhibits include: references to the Court's docket sheet aimed at establishing the timeliness of his pleadings, and letters from an insurance carrier informing certain health care providers that Dr. Benjamin is not currently under

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[1] This is not to say that Dr. Benjamin does not include affidavits with his pleadings. However those affidavits alone do not suffice to establish the necessary elements of his claims, nor are they legally acceptable in certain cases.

suspension from Medicare Services, and that prior information to the contrary was inaccurate. While these materials are more likely admissible they nonetheless do not provide evidence relevant to the issues they are presented to support. Dr. Benjamin also includes various documents with his Complaint which are in large part legally irrelevant, including TAMC memoranda from various doctors stating they would no longer allow Dr. Benjamin to attend to their patients, letters of reference in support of Dr. Benjamin, as well as the memorandum announcing the termination of Dr. Benjamin's staff privileges at TAMC.

When matched against the substantive elements of his legal claims, Dr. Benjamin's evidence is plainly insufficient to bear out these claims. On this ground alone summary judgment must be granted, for Rule 56(c) of the Federal Rules of Civil Procedure plainly imposes upon the plaintiff the duty to make a "showing sufficient to establish the existence of an element essential to the party's case ... ." Celotex 477 U.S. at 322; see also parr v. Muratore, 8 F.3d 854, 859 (Ist Cir. 1993) ("A nonmovant [1 bears the burden of placing at least a single material fact into dispute after a moving party offers evidence of the absence of a genuine issue."); Mack v. Great Atlantic and Pacific Tea Co., 871 F.2d 179, 181 (ist Cir. 1989) (one who opposes a Rule 56 motion "may not rest upon her laurels (or her pleadings).") Against this background, the Court turns to the more specific defects in Dr. Benjamin's Counts.

III. Discussion

As noted, Dr. Benjamin proceeds pro se, and the Court consequently affords him certain liberties. See Estelle v. Gamble, 429 U.S. 97, 106 (1976); Johnson v. Rodriauez, 943 F.2d 104, 107 (Ist C;r. 1991), cert denied, 502 U.S. 1063 (1992); Ayala Serrano v. Lebron Gonzalez, 909 F.2d 8, 12 (Ist Cir. 1990). His complaint, however, tests the bounds of this leniency. It makes sweeping, and unsubstantiated statements in an effort to support several untenable, if not outrageous, legal assertions. Dr. Benjamin, for example, seeks redress under the Constitution's

prohibition against Bills of attainder, cruel and unusual punishment, and self-incrimination. He also asserts his rights to: "Freedom of Assembly," a speedy trial, and effective assistance of counsel. The Court need not address these claims as they could not prove noteworthy under any version of the facts presented.

Plaintiff's complaint does, however, allege several theories which merit discussion. The Court reads Plaintiffs complaint to contain claims under the Sherman and Clayton Acts in Counts I, IV and V, claims under 42 U.S.C. 1981 and 1983 in Count II, and a state law claim for "Malicious Abuse ofReport" in Count III. Dr. Benjamin incorrectly assumes that Defendants only seek judgment on Counts I, II and III. To the contrary, Defendants attack all claims and specifically challenge all of Plaintiffs "antitrust claims," thus implicating counts IV and V. (Def Mot. Summ. J., 13-19.)

A. Counts I; TV, V: Sherman and Clayton Act Claims

In Counts I, IV and V, Dr. Benjamin alleges violation of 1, 2, 14, 15, 24 and 26 of Title 15.[2] Dr. Benjamin's claims fail on all three counts for a variety of reasons, chief among them, as noted, is the lack of substantiation. His claims also suffer fiom various other legal infirmities. Accordingly, the Court grants Defendants' Motion for Summary Judgment on Counts I, IV and V.[3]

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[2] The key claims at issue come under 1 (restraint oftrade), 2 (monopoly), and 14 (tying/exclusive dealing) of Title 15. The other sections merely provide the basis of relief or liability once violations are found. 15 U.S.C. 15 (authorizes suit and sets guideline for damages), 24 (liability of directors and agents of corporation), 26 (provides for injunctive relief).

[3] Money damages for these claims would most likely be barred under the immunity provision of the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. 11133, as described below in section C. Patrick v. Bureet, 486 U.S. 94, 105 n.8 (1988). However as the HCQIA does not preclude injunctive relief, the Court reviews the substance of Plaintiffs Count I claims. Bryan v. James E. Holmes Rerr. Med. Ctr., 33 F.3d 1318, 1323 n.4 (llth Cir. 1994) (quoting H.R. Rep. No. 903, at 9, reprinted in 1986 U.S.C.C.A.N. at 639)

1. Count I

In Count I, entitled "Damages for Monopolizing part of Trade, Services or Commerce," Dr. Benjamin alleges that the Defendants violated g 2 of Title 15 by monopolizing, attempting to monopolize and/or conspiring to monopolize the medical practice in the Presque Isle area. Dr. Benjamin's claim under 14, also listed under Count I, is a claim for tying or exclusive dealing. Dr. Benjamin bases this claim on TAMC's termination of his hospital privileges and the various difficulties he had with TAMC staff, such as the refUsal of certain Caucasian staff members to cover his patients.[4] Dr. Benjamin, however, presents insufficient evidence to bear out these claims. For example, of the three references to supporting evidence in his Response Brief, two refer to his own flawed Affidavit, and the third merely documents the fact that TAMC reported Dr. Benjamin's termination to a national data base.[5]

("HCQIA does not restrict the rights of physicians who are disciplined to bring private causes of action for injunctive or declaratory relief."), cert. denied, 115 S. Ct. 1363 (1995).

[4] Specifically Dr. Benjamin claims that TAMC illegally: (1) sought to force his resignation; (2) refUsed to honor his medical orders; (3) refused to include him on the list of doctors capable of performing EKG readings; (4) "seized his patients;" (5) reassigned his patients; (6) ordered him not to admit new patients; (7) required his patients to seek the services of other physicians in order to gain medical care at TAMC; and (8) stripped him of his medical privileges. (Resp. at 6.)

[5] Dr. Benjamin does attach several exhibits to his motion responding to the issue of antitrust damages. While not cited in Dr. Benjamin's Summary Judgment Response, the Court reviewed these exhibits nonetheless. These documents include various letters which establish that other doctors at TAMC have refUsed to share on-call responsibilities with Dr. Benjamin, an affidavit testifling to the alleged well known policy of TAMC to force Dr. Benjamin from the hospital, and other affidavits from former patients asserting that they would not have changed doctors but for the fact that "Blue Select" told them to. These documents do not shed light on either TAMC's monopoly power or market share at issue in the Count I claims.

While the elements of each of the Count I claims varies, common to each is the need for economic evidence to establish either the Defendants' monopoly power, or their intent or ability to influence competition. These concepts require a detailed analysis, and while this Court is unaware of a specific quantum of evidence necessary to credibly establish these factors, Dr. Benjamin offers no economic data, expert testimony or other credible economic evidence on these issues. The Court reviews Dr. Benjamin's specific claims below.

a. Monopoly claim

Section 2 of the Sherman Act prohibits the formation of monopolies, attempts to do so, as well as combinations and conspiracies formed for that purpose. IS U.S.C. 2; see also Coastal Fuels of Puerto Rico. Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 195 (Ist Cir. 1996), petition for cert. filed, (Jul. 2, 1996) (No. 96-20). To prevail on a claim ofmonopolization under 2 of the Sherman Act, a plaintiff must show that the defendant: (1) has monopoly power in the relevant market; and (2) "has engaged in impermissible exclusionary practices with design or effect of protecting or enhancing its monopoly position." Id. (quoting Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice 6.4a (1994)); see also Town of Concord v. Boston Edison Co., 915 F.2d 17, 21 (Ist Cir. 1990), cert denied, 499 U.S. 931 (1991). The later requirement is often referred to as exclusionary conduct.

As Dr. Benjamin fails to adduce sufficient evidence to establish the necessary element of monopoly power his claim must fail. Monopoly power, or market power as it is commonly referred, often turns on the issue of market share, which may depend on evidence of supracompetitive prices, restricted output, or barriers to market entry -- technical concepts which require detailed evidence in support. See Coastal Fuels. 79 F.3d at 196

(citing Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir.), cert. denied, 116 S. Ct. 515 (1995)); see, e.g., Weiss v. York Hosp., 745 F.2d 786, 826-27 (3rd Cir. 1984), cert. denied, 470 U.S. 1060 (1985) (evidence consisting of expert testimony and testimony as to hospital's market share of inpatient hospital services in its medical service area presented to establish monopoly power). Courts have held, for example, that a charge ofmonopolization will fail if the defendant is not alleged to maintain at least a seventy percent market share -- a quantifiable percentage borne out by specific calculations. See White Ban Co. v. International Paper Co., 579 F.2d 1384, 1387 (4th Cir. 1974) (defendant must control at least seventy percent of the relevant market to be subject to monopolization claim); see, e.n., Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 201-02 (3d Cir. 1992) (a plaintiff must show a "significantly larger" market share than 55 percent to establish a prima facie case of monopoly power), cert. denied, 113 S. Ct. 1285 (1993).

Even assuming that Dr. Benjamin identified the most narrow of geographic locations and competitors or product type sufficient to adequately define the relevant market, his claim is nonetheless defective due to his failure to provide any evidence ofTAMC's control over that market.[6] He presents nothing to indicate TAMC's percentage of the market share in either the internal medicine field, or the health care industry generally. Rather he relies on his bare assertions that TAMC enjoys a "dominant position within the health care services market in the Presque Isle, Maine area," (Compl. at fl V), and that it is "the only hospital in the greater [Presque Isle] area" (Resp. at 5), and the "largest" and the "most powerful" employer in Presque Isle, (id; at 8). Dr. Benjamin also fails to present evidence on any of the other factors used to measure monopoly power, such as: "the size and strength of competing firms, freedom of entry into the field, pricing trends and practices in the industry, ability of consumers to substitute comparable goods on services from outside the market, and consumer demand factors." Weiss, 745 F.2d at 827, n.72 (citing L. Sullivan, Handbook of the Law of Antitrust 22 (1977)). He fails to cite facts, figures or any data relevant to the monopoly power inquiry, and consequently his claim must fail. See, e.g., Forro Precision. Inc. v. International Business Machines Corp., 673 F.2d 1045, 1059 (9th Cir. 1982) (monopoly claim denied due to the lack of "expert testimony or other credible evidence to support an inference of market power."), cert. denied, 471 U.S. 1130 (1985); Juneau Square Corp. v. First Wisconsin Nat. Bank of Milwaukee, 624 F.2d 798, 813-14 (7th Cir.) (monopoly claim denied due to both speculative nature and lack of evidence as to defendant's market share), cert. denied, 449 U.S. 1013 (1980).

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[6] The Court concedes a great deal here as Dr. Benjamin's Complaint fails to sufficiently identifjl the relevant market necessary to the monopoly power inquiry. The relevant market is defined both geographically, and by product. See Coastal Fuels, 79 F.3d at 197. In 2 claims, the plaintiff bears the burden of establishing both, and must do so with specificity. Id. at 197 (citing H.J.. Inc. v. Int'l Tel. & Tel. Corn.. 867 F.2d 1531, 1537 (8th Cir. 1989)). The relevant market is that geographic area where defendants face competition and consumers

b. Attempt to Monopolize

To succeed on his claim of attempted monopolization under 2, Dr. Benjamin must prove: "(1) that the defendant[s] halve] engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." Spectrum Sports v. McQuillan, 506 U.S. 447, 456 (1993); see also George R. Whitten. Jr.. Inc. v. Paddock Pool Builders. Inc., 508 F.2d 547, 550 (lst Cir. 1974), cert. denied, 421 U.S. 1004 (1975). Dr. Benjamin relies on the same facts as above to establish this claim. Accordingly, this claim must also fail due to Dr. Benjamin's inability to establish either TAMC's monopoly power, or its probability of attaining monopoly power.

c. Combine or Conspire to Monopolize

Dr. Benjamin's combination or conspiracy claim revolves around an alleged conspiracy or combination either between the hospital and its staff or among the hospital staff itself, whose supposed aim was to depr;.ve Dr. Benjamin of his staff privileges

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can find alternative product sources. Coastal Fuels. 79 F.3d at 196 (quoting Baxlev-DeLamar v. American Cemetery Assn., 938 F.2d 846, 850 (8th Cir. 1991)).

Dr. Benjamin fails to adequately define either the geographic area or the product of the alleged relevant market. His pleadings speak of the State ofMaine, the City ofPresque Isle, and the greater Presque Isle area, rather than ofa single detailed geographic area. As to the product at issue, or the group of his competitors, Dr. Benjamin broadly references a wide range of medical services. These generalities fail to clearly define the relevant market. See, e.g., Coastal Fuels, 79 F.3d at 197 ("[m]arket definition is crucial [to a 2 claim]. Without a definition of the relevant market, it is impossible to determine market share [and plaintiffs claim must thus fail].") (quoting Rebel Oil Co., 51 F.3d at 1434); Fleael v. Christian Hosp. Northeast-Northwest, 4 F.3d 682, 690-91 (8th Cir. 1993) (granting summary judgment due to plaintiff s failure to establish relevant market).

at TAMC. A conspiracy by nature contemplates concerted action among at least two legally distinct persons or entities. Despite the fact that the doctors individually and TAMC represent legally distinct entities, the doctors in their capacity as staff members, in particular as members of the peer review committee, act on behalf of the hospital. Thus the hospital and its staff, or the staff as a whole, can be considered a single entity for the purposes of peer review and other administrative decisions. A combination of these doctors, or the doctors and the hospital would thus be incapable of actually conspiring with one another. See Oksanen v. Pane Memorial Hosp., 945 F.2d 696, 703 (4th Cir. 1991), cert. denied, 502 U.S. 1074 (1992). This relationship is best described as one of agency, not conspiracy, in particular because in the present circumstance "there are no strong antitrust concerns that would warrant a departure fiom traditional concepts of agency since the hospital and medical staff are not competitors." Nurse Midwifery Associates v. Hibbett, 918 F.2d 605, 614 (6th Cir. 1990), cert. denied, 502 U.S. 952 (1991).[7]

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[7] In Oksanen, the Fourth Circuit highlighted the benetits of encouraging hospitals to delegate various responsibilities to staffcommittees. 945 F.2d at 704. In the case of peer reviews, the court noted: "[o]ne presumed benefit of authorizing the medical staff to conduct the initial peer review is that it allows physicians with expertise in medical care to make an initial evaluation of whether other physicians have achieved a certain level of professional competence." Id.

Several courts have concluded that a hospital cannot conspire with its staff for the purpose of 1 of the Sherman Act. Oksanen 945 F.2d at 703-05; Nurse Midwifery, 918 F.2d at 614; Weiss, 745 F.2d at 816-17; Nanavati v. Burdette Tomlin Memorial Hosp., 857 F.2d 96, 1 18 (3rd Cir. 1988), cert. denied, 489 U.S. 1078 (1989); Pudlo v. Adamski, 789 F. Supp. 247, 251 CN.D. Ill. 1992), aff'd, 2 F.3d 1153 (7th Cir. 1993), cert. denied, 1 14 S. Ct. 879 (1994).[8] In reaching that conclusion, these courts relied chiefly on the Supreme Court's disposition in Copperweld Corn. v. Independence Tube Corp., which held that a parent corporation was incapable of conspiring with its wholly owned subsidiary for the purposes of g 1 of the Sherman Act. 467 U.S. 752, 777 (1984). In analogizing to the hospital-medical staff relationship or more accurately the hospital-peer review committee
relationship, the Fourth Circuit, for example, adopted a fUnctional approach, looking to the practical authority of the hospital peer review committee in dealing with the physician in question. Oksanen 945 F.2d at 703; see also Pudlo, 789 F. Supp. at 251. The court concluded that the hospital, like a corporation, had effectively delegated decisionmaking authority to its staff for the purposes of peer review. Id. Specifically, the Oksanen court held that: "[i]n effect, the medical staff was working as the Board's agent under an internal agreement to implement a single, unitary firm's policies of evaluating the conduct and competence of those to whom the hospital extended privileges." 945 F.2d at 703 (quoting Copperweld, 467 U.S. at 769) (internal quotations omitted).

While the First Circuit has yet to adopt such reasoning with regard to hospitals and their medical staffs, it has interpreted

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[8] The Ninth and Eleventh Circuits, however, have held that a hospital and its medical staff constitute legally distinct entities capable of conspiring with one another. See Bolt v. Halifax Hospital Medical Center, 851 F.2d 1273, 1280 (Ilth Cir. 1988), vacated and superseded on other grounds, 891 F.2d 810(11th Cir.), cert. denied, 495 U.S. 924(1990); Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1449-50 (9th Cir. 1988).

the Supreme Court's decision in Copperweld to require the unity of interest analysis adopted by these courts. Sullivan v. National Football League, 34 F.3d 1091, 1099 (Ist Cir. 1994), cert. denied, 115 S. Ct. 1252 (1995). The Court also finds this 1 conspiracy analysis applicable to the present 2 claim. For these reasons, and for the other grounds cited above the Court grants Defendants' Motion for Summary Judgment on Plaintiffs Count I conspiracy/ combination claim.

d. Tyin/ Exclusive dealing agreement

Dr. Benjamin also alleges a violation of g 14 of Title 15 which governs tying arrangements and exclusive dealing agreements.[9] Generally "[a] tying arrangement is an agreement by a party to

sell one product only on the condition that the buyer also purchase a different or 'tied' product." Foremost Pro Color. Inc. v. Eastman Kodak Co., 703 F.2d 534, 540 (9th Cir. 1983), cert. denied, 465 U.S. 1038 (1984). While the Court remains uncertain as to the exact nature ofDr. Benjamin's 14 claim, it is nonetheless clear that he has not established that TAMC's actions either "substantially lessen competition or tend to create a monopoly in any line ofcommerce." 15 U.S.C. 14; see Black

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[9] The statute provides in pertinent part:

[I]t shall be unlawfUl for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale ofgoods, ... for use, consumption, or resale ..., on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods ... of a competitor or competitors of the lessor or seller, where the effect ... may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 u.s.C. g 14.

Gold Ltd. v. Rockwool Industries. Inc., 729 F.2d 676, 684 (10th Cir. 1984), cert. denied. 469 U.S. 854 (1984). As with his monopoly claims above, Dr. Benjamin fails to provide any economic data to establish the impact of TAMC's actions on competition. Accordingly, the Court grants Defendants' Motion on this claim.

2. Count TV and V

Dr. Benjamin alleges violations of 1 and 2 of Title 15 in Count IV, and 1, 2 and 24 (provision for liability of directors and agents of corporation) in Count V. Count IV entitled, "Peer Review as Restraint of Trade and Attempted Monopolization of Practice," alleges that members of the internal medicine staff at TAMC conspired to monopolize this trade. While Dr. Benjamin more clearly defines the relevant market, Aroostook County, and product, internal medicine, he still fails to provide competent evidence to bear.out the issue nf mnnor>olv newer under 2. This claim thus fails.

To prevail on his 1 claim, Dr. Benjamin must establish: (1) a contract, combination or

conspiracy; (2) restraint oftrade; and (3) an effect on interestate commerce. Fuentes v. South Hills Cardiology, 946 F.2d 196, 198 (3rd Cir. 1991). Dr. Benjamin substantiates this claim with memorandum fiom various doctors documenting their refUsal to cover his patients. Additionally he provides the affadavit of Nurse Teresa Case, who testified that "it was common knowledge among nurses at TAMC that there was a move to drive [Dr.] James Benjamin away fiom the Hospital." (Case Aff., i.) Dr. Benjamin's claim nonetheless fails because while doctors may be capable of conspiring as independent actors, they cannot form a conspiracy in their capacity as members ofa hospital peer review committee, as discussed above. Oksanen, 945 F.2d at 706. Accordingly, Dr. Benjamin's 1 claim fails.

Under Count V, entitled "Restraint of Trade," Dr. Benjamin alleges that TAMC restrained trade by: (1) failing to disclose necessary records to complete his application to the Carey Medical Center; and (2) by prematurely disclosing information to the Maine State Board of Licensure in Medicine, which in turn transmitted this material to its sister agency in Michigan, preventing Dr. Benjamin's practice in Michigan as well as in Maine. The Court questions whether these facts could ever form the basis of a Sherman Act claim. However, the Court need not delve into this question as Plaintiffs evidence is again insufficient to prevail on either claim. Specifically Dr. Benjamin's proof is insufficient as to: (i) the necessary element of monopoly power needed to prevail under his 2 claim, and (2) the requisite conspiracy evidence necessary to prevail under g 1.

B. Count II: Racial Discrimination Claim

Dr. Benjamin's Count II claim, entitled "Denial of Hospital Privileges," alleges racial discrimination in violation of42 U.S.C. 1981 and 1983. In short, Dr. Benjamin claims that TAMC denied him his due hospital privileges, and discriminated against him generally on the basis of his African-American heritage. For the reasons that follow the Court grants Defendants' Motion for Summary Judgment on both Count II claims.

1. 1983

Dr. Benjamin claims that TAMC violated 1983 by infringing upon his constitutional rights to equal protection under the Fifth and Fourteenth Amendments. To state a claim under 1983 Dr. Benjamin must show: (i) the existence of a federal or statutory right, and (2) a deprivation of that right by a person acting under color of state law. Barrios-Velazauez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 84 F.3d 487, 491 (Ist Cir. 1996); Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 32 (Ist Cir. 1996). Under the second prong requirement the entity in question must be a state actor. See, e.g., Johnson. 943 F.2d at 107 ("Section 1983, after all, applies only to improper action under color of state law--and is, therefore, an

irrelevancy in the case of [1 a private institution."). As Dr. Benjamin invokes federal rights, at issue is whether TAMC constitutes a state actor for the purposes of 1983.[10]

Dr. Benjamin characterizes TAMC as a state actor on the grounds that its peer reviews were required by state law. TAMC is a private, non-profit hospital, which conducts peer reviews consistent with internal guidelines and state and federal law. However neither compliance with, nor enforcement of state or federal statutes alone qualifies a private hospital as a state actor. Courts

employ a variety of tests in determining whether private entities engage in state action for the purposes of 1983. The First Circuit recently divided its state actor analysis categorically, looking first to the possibility of direct state action and then to any incidents of indirect state action. Barrios-Velazauez. 84 F.3d at 491.

The Court performs this analysis below and concludes that TAMC does not act under color oflaw, either directly or indirectly. Accordingly, the Court grants Defendants' Motion for Summary Judgment as to Count II.

a. Direct State Action

Under the direct state action test courts inquire into - whether the entity at issue is either a state agency or whether it mimics a state agency, conceding that "technical labels are not dispositive." Id; at 492 (citing Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995)). The First Circuit, relying on the

[10] The Court notes in passing that several courts have found private hospitals to be private entities and not state actors. See, e.g., Rockwell v. Cane Cod Hosp., 26 F.3d 254, 260-61 (Ist Cir. 1994); Harvev v. Harvev, 949 F.2d 1127, 1132 (lith Cir. 1992); Mendez v. Belton. 739 F.2d 15, 18 (Ist Cir. 1984); Modaber v. Culver Memorial Hosp., Inc., 674 F.2d 1023, 1027 (4th Cir. 1982). However as the "state action inquiry" is fact-driven, the Court begins anew. Barrios-Velazauez. 84 F.3d at 491.

Supreme Court's disposition in Lebron v. National R.R. Passenger Corp.. 115 S. Ct. 961, held that the controlling factor in the direct state action inquiry was the "degree of control the federal [or state] government had over [the entity in question]." Barrios-Velazauet. 84 F.3d at 492; See also Lebron, 115 S. Ct. at 974-75 (Supreme Court held that Amtrak was a state actor because, among other factors, the federal government appointed members to its board, owned voting stock and subsidized perennial losses). In the case at bar Dr. Benjamin provides no evidence to establish that TAMC is controlled or even influenced by officials working for either the State of Maine or the federal government. Consequently TAMC does not qualifjl as a state actor under this test.

b. Indirect State Action

The First Circuit employs three distinct tests to determine whether an entity's actions rise to the level of state action under the indirect state action test: (1) the nexus test, (2) the traditional public fUnction analysis, and (3) the symbiotic relationship test. Barrios-Velazauez, 84 F.3d at 49293; Rodrigquez v. Garcia-Davila, 904 F.2d 90, 96 (Ist Cir. 1991). Satisfaction of any one of these tests compels a finding that the entity in question qualifies as a state actor. The Court examines each test below concluding that TAMC does not qualify as a state actor under any of the three articulated

i. Nexus Test

Under the nexus test, the Court must determine whether the state exerted such extensive coercion or encouragement that TAMC's action, here its peer review of Dr. Benjamin, can be considered the conduct of the state itself. Barrios-Velazauez 84 F.3d at 493; Rodriauez-Garcia. 904 F.2d at 97. Dr. Benjamin relies on state and federal regulation to establish the "nexus" between the government and TAMC. Courts have, however, consistently held that neither government financing nor regulation, either alone or together, necessarily suffice to convert

private action into state action. See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1004(1982) (extensive regulation did not convert nursing home into a state actor); Rendell-Baker v. Kohn, 457 U.S. 830, 840-41 (1982) (extensive government funding and regulation did not convert private school into a state actor); Rockwell, 26 F.3d at 258 C'government regulation, even extensive regulation, and the receipt of federal funds, such as Medicare, Medicaid and Hill-Burton funds, are insufficient to establish that a hospital or other entity acted under color of state law"); Mendez, 739 F.2d at 18 (same). Thus neither the existence of state or federal statutes authorizing peer reviews, nor the receipt of government fUnding suffice to qualify TAMC as a state actor.

ii. Traditional Public Function Test

Under the traditional public fUnction test, an entity qualifies as a state actor if it has "assumed powers 'traditionally exclusively reserved to the State.'" Barrios-Velazauez. 84 F.3d at 493-94 (quoting. Rodriaues v. Furtado, 950 F.2d 805, 813 (Ist Cir. 1991)). Under this test, the government cannot escape its responsibilities in areas it traditionally performs by simply transferring those duties to a private entity. Id. (citing Rockwell, 26 F.3d at 258). To qualify as state action the activity at issue thus must be both a traditional government function, as well as an exclusive government function. Rodriguez-Garcia, 904 F.2d at 98; see also Rendell-Baker, 457 U.S. at 842 ("[O]ur holdings have made clear that the relevant question is not simply whether a private group is serving a 'public function.' We have held that the question is whether the fUnction performed has been 'traditionally the exclusive prerogative of the State.'") (citations omitted)).

Dr. Benjamin's claim fails on either prong because courts have yet to classify health care services as either an exclusive or traditional government function. The Supreme Court has held that "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" Flagg Bros.. Inc. v. Brooks, 436 U.S. 149, 158-59; see

also White v. Scrivner Corp., 594 F.2d 140, 142 (5th Cir. 1979) (even the acts ofarrest, detention, and search are not considered exclusive government actions); see, e.g., Blum, 457 U.S. at 1011-12 (nursing home care is not a traditional and exclusive government function), Barrios-Velazauez, 84 F.3d at 494 (promoting savings, providing loans and administering medical services is not an exclusive government fUnction); Gallagher v. "Neil Young. Freedom Concert", 49 F.3d 1442, 1456 (10th Cir. 1995) (safeguarding public property is not an exclusive government function); McKeesport Hosp. v. Accreditation Council for Graduate Medical Educ., 24 F.3d 519, 525 (3rd Cir. 1994) (evaluation and accreditation of medical facilities is not an exclusive state function), Gerena v. Puerto Rico Legal Services, Inc., 697 F.2d 447, 451 (ist Cir. 1983) (civil legal assistance to indigent clients is not a traditionally exclusive public fUnction).[11]

iii. Symbiotic Relationship Test

An entity can be considered a state actor under the symbiotic relationship test if it acts as if the government "has so far insinuated itself into a position of interdependence with [the private entityl that it must be recognized as ajoint participant in the challenged activity .. ." Barrios-Velazquez 84 F.3d at 494 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)). In the case at bar, the government's involvement in TAMC's peer review process is minimal if not nonexistent. Aside from providing legal guidelines, the government plays little to no role in the process. The government has in no way "insinuated" itself into the peer review process at TAMC such that TAMC could be considered to be in a "position of interdependence" with the state. See Rodriauez-Garcia, 904 F.2d at 98.

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[11] The Supreme Court has held, however, that the management of city parks, Evans v. Newton 382 U.S. 296, 298-302 (1966), the administration of public elections, Terrv v. Adams, 345 U.S. 461, 468-70 (1953), and the operation of company owned towns, Marsh v. Alabama, 326 U.S. 501, 505-09 (1946), do constitute exclusive and traditional government functions.

2. 1981

Section 1981 of Title 42 prohibits purposefUl racial discrimination in the formation and enforcement of contracts. Patterson v. McLean Credit Union, 491 U.S. 164, 176-77 (1989); Dartmouth Review v. Dartmouth College, 889 F.2d 13, 17 (lst Cir. 1989).[12] To that extent the statute's scope remains narrow, and it "cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts ." Patterson, 491 U.S. at 176 (1989). Postformation conduct, thus, does not fall within the statute's protections. Id. at 176-77.[13]

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[12] Section 1981 of Title 42 reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactionsofevery kind, and to no other.

42 U.S.C. 1981(a). Section 1981 extends to both state and private action, and thus reaches TAMC. Dartmouth Review, 889 F.2d at 17.

[13] In Patterson v. McLean Credit Union, the Supreme Court detailed the scope of
1981, stating:

> By its plain terms, the relevant provision in 1981 protects two rights: 'the same right ... to make ... contracts' and 'the same right ... to ... enforce contracts.' The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits, when based on race, the refUsal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established

Consequently only Dr. Benjamin's allegations regarding his contractual relationship with TAMC are legally relevant here. The claims relating to his interaction with various staff members and nurses, for example, are not cognizable under 1981 because they do not relate to his contract. Pontarelli v. Stone, 930 F.2d 104, 114 (Ist Cir. 1991) ("an action for racial harassment on the job does not lie under 42 U. S.C. 1981") (citing Patterson, 491 U.S. at 179).

A cause of action under 1981 requires a relevant contract related act, and both purposeful and racially motivated discrimination. Id.; Stephenson v. State Street Bank & Trust Co,. 924 F. Supp. 1258, 1279 @. Mass. 1996). "Ifany of these elements is missing, a section 1981 claim cannot flower." Dartmouth Review, 889 F.2d at 16. Dr. Benjamin fails to prove the second prong discrimination requirement. While he notes the absence of other African-Americans on the TAMC staff, and speaks to mistreatment by nurses and TAMC staff, and even presents an affadavit attesting to the alleged policy to force him from the hospital staff, these allegations all relate to

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contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.

The second of these guarantees,'the same right ... to ... enforce contracts ... as is enjoyed by white citizens," embraces protection ofa legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race .... It also covers wholly private efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing the terms ofa contract .... The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights

... 1981 ... covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process.

491 U.S. at 176-80 (internal citations omitted) (emphasis in original).

postformation conduct. They are thus not legally relevant in 1981 analysis. See, e.g., Butler v. RMS Technologies. Inc., 741 F. Supp. 1008, 1010 (D. Mass. 1990) (claims relating to postformation conduct not cognizable under 1981). Dr. Benjamin provides no evidence of racial discrimination as to the formation of his contract, or its enforcement through the legal process. The Court therefore grants Defendants' Motion for Summary Judgment on this claim.

C. Count III: Malicious Abuse of Report

In Count III, Dr. Benjamin asserts a claim for "Malicious Abuse of Report," alleging that TAMC reported information regarding Dr. Benjamin's conduct to various medical boards which it knew to be false. This claim revolves around the TAMC's November, 1993 peer review committee report which evaluated Dr. Benjamin's performance at the hospital. This committee recommended the suspension ofDr. Benjamin's hospital privileges, and his privileges were later terminated entirely. On November 18, 1993 TAMC Chief Executive Officer David Peterson filed a report regarding Dr. Benjamin's suspension to the Maine State Board of licensure in Medicine. Peterson also forwarded this information to the National Practitioner's Data Bank on January 4, 1994.

Defendants characterize this claim as one for abuse of process. The exact nature of the tort, however, is not of particular importance in this instance as provisions in both the HCQIA, 42 U.S.C. 11101-11152, and the Maine Health Security Act, 24 M.R.S.A. 2501-2512, require hospitals to disclose certain adverse employment decisions. Furthermore both the statutes afford immunity to the officials and hospitals that provide this type of information. 42 U.S.C. 11111; 24 M.R.S.A. 2511. TAMC claims immunity under this legislation and because they qualify the Court grants Defendants' Motion for Summary Judgment as to Count III.

1. Federal law

a. 11112 requirements

Immunity under the HCQIA is a question of law. Brvan, 33 F.3d at 1332 (citing H.R. Rep. No. 903, at 12, reprinted in 1986 U.S.C.C.A.N. at 6392); see also Austin v. McNamara, 979 F.2d 728, 734 & n.5 (9th Cir. 1992). Under 4 11133 of Title 42, health care entities which conduct "professional review actions" must report these reviews to both the Secretary of Health and Human Services and the "appropriate State licensing board" if the review "adversely affects the clinical privileges of a physician for a period of longer than 30 days." The reporting entity, whether an individual, a review body or a hospital, enjoys immunity from damages as to its disclosure for all suits except civil rights actions. 42 U.S.C. g 11111. Immunity, however, is contingent on the satisfaction of 11 1 12(a)'s requirements, which provide that a professional review action must be taken:

(1) in the reasonable belief that the action was in the furtherance of quality health care;

(2) after a reasonable effort to obtain the facts of the matter;

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and;

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

Id. at 11112(a).

Most important, the statute presumes that the professional review body has met these requirements, "unless [this] presumption is rebutted by a preponderance of the evidence." Id. This presumption alters the typical summary judgment scenario creating an "unusual standard." Mathews v. Lancaster General Hospital, 1996 WL 344921, *6 (3rd Cir.). Thus under the Act the burden lies with Dr. Benjamin to show

that TAMC failed to comply with the g 11112 requirements and that it is not consequently entitled to the HCQIA's grant ofimmunity. Bryan, 33 F.3d at 1333. The Court turns to the record "to determine whether IDr. Benjamin] satisfied his burden of producing evidence that would allow a reasonable jury to conclude that the Hospital's peer review disciplinary process failed to meet the standards of the HCQIA." Id. at 1334; see also Austin, 979 F.2d at 734 ("Might a reasonable jury, viewing the facts in the best light [to the plaintiffl, conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of 11112(a)?").

Dr. Benjamin's attack could be read to challenge several of the 11112(a) requirements. First he alleges that the hospital lied, implicating prongs (2) and (4). Additionally Dr. Benjamin asserts that the hospital used this information to maliciously attack him violating g 11112(a)(l)'s aim offUrthering "quality health care."[14] Specifically Dr. Benjamin argues that TAMC falsely concluded that he was unavailable for his patients, and that its assertion as to his incompetence is contradicted

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[14] Dr. Benjamin does not contest that the TAMC review committee constitutes a "professional review body," or that his suspension and later termination qualifjl as a "professional review action." See, e.g., Bryan, 33 F.3d at 1334 (board of directors revoking doctor's staff privileges constitutes "professional review body" taking "professional review action" under the HCQIA.) The HCQIA defines a "professional review body"as:

> a health care entity and the governing body or any committee ofa health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

42 U.S.C. g 11151(11). A "professional review action" is defined as:

> [A]n action or recommendation ofa professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges ... of the physician.

by the hospital's own performance records. Dr. Benjamin, however, fails to provide competent evidence to either rebut, or even question TAMC's action on the basis of 1 1 1 12, and the statute imposes that burden on him. Dr. Benjamin's pleadings on this issue contain only one supporting citation, a reference to a TAMC report entitled, "Summary of Events Concerning Dr. James Benjamin's Summary Suspension" and this evidence neither supports Dr. Benjamin's assertions, nor provides any other evidence which calls into question TAMC's actions.[15] As to the claims relating to his professional competence, Dr. Benjamin provides no supporting evidence to rebut the hospital's conclusions.[16] His unsubstantiated assertions alone are insufficient to create a disputed issue of material fact.[17]

Id. 11151(9).

TAMC also qualifies as a "health care entity" given it constitutes "a hospital that is licensed to provide health care services by the State in which it is located." Id. 11151(4)(A)(i).

[15] Dr. Benjamin cites this report to rebut TAMC's charge that he was unavailable for his patients in early November, 1993. He quotes a reference in the report made by Dr. Jones, that states that Dr. Benjamin "was on the floors writing orders on patients .. ." to support his claim that he was in fact present at the hospital during the disputed time period. fResp. at 10.) Dr. Jones' comment, however, refers to November 12, a day not within the challenged period.

[16] Dr. Benjamin makes references to various peer reviews characterizing his performance as "appropriate" but does not provide supporting documentation of this fact. He also provides several letters of reference attesting to his professional competence, however, these letters do not comment specifically on his work at TAMC.

[17] As the Court grants summary judgment on Count II1 for a lack of credible evidence, the Court need not address Defendants' assertions relating to the prior state court proceeding involving these parties, and any collateral estoppel effect they may have on the present action.

b. 11133 immunity

Dr. Benjamin also seeks to invoke the HCQIA's immunity waiver, g 11 133(c)(l), which strips the relevant health care entity of the statute's immunity protections if that entity fails to report information required under the statute. 42 U.S.C. g 11133(c)(l). This provision is triggered, however, "only if the Secretary [ofHealth and Human Services] first publishes the name of the entity in the Federal Register pursuant to [the] provisions of section 1 11 Il(b) of the Act." Johnson v. Greater Southeast Community Hosp. Corp., 1996 WL 377147, *9 (D. D.C.).

Dr. Benjamin asserts that TAMC failed to report several of his supposed improprieties, such as his alleged "incompetence/malpractice/negligence," "substandard clinical performance," and "disruptive behavior." (Resp. at 12-13). Dr. Benjamin, however, neither argues, nor presents any evidence that the Secretary has ever listed TAMC among the list of delinquent health care entities as required under the statute. 42 U.S.C. Illll(b). Nor does Dr. Benjamin suggest that the Secretary has ever taken any of the due process measures required by the HCQIA before the Secretary can list the entity in the Federal Register. Id. HCQIA requires "notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing."). Thus the Court need not address the question of whether or not TAMC has waived its immunity, as there is no evidence that they would be in a position to do so. See, eg, Imperial v. Suburban Hosp. Ass'n. Inc., 37 F.3d 1026, 1030 (4th Cir. 1994) (g 1 1 I 1 I(b) immunity waiver not triggered because plaintiff failed to provide evidence that Secretary ever investigated, charged or cited hospital for violating 1 1133's reporting requirements); Greater Southeast Community Hosp. Corp., 1996 WL 377147 at *9 (same).

2. State law

Defendants enjoy immunity from suit under Maine law, which affords physicians and professional competence committees, among others, "acting without malice," immunity from civil liability for "any report or other information Emade] available to any board, appropriate authority, professional competence committee or professional committee pursuant to law." 24 M.R.S.A. 2511. The Supreme Judicial Court of Maine has defined malice as either "actual malice, i.e., ill will, or implied malice, i.e., reckless disregard for the truth or falsity of the slanderous element of a statement." Gnat v. Penobscot Bay Medical Center, 574 A.2d 872, 874 (Me. 1990) (internal citations omitted). As Dr. Benjamin provides no significant evidence of malice, Defendants may avail themselves of the 2511 grant of immunity. This immunity, unlike the federal immunity, shields the Defendants not just from money damages but from suit entirely. Accordingly, the Court grants Defendants' Motion for Summary Judgment on Count III.

IV. Attorney's Fees

Finally, Defendants move for attorney's fees pursuant to 42 U.S.C. g 11113. The HCQIA allows for attorneys' fees if either the plaintiffs claim or actions were "frivolous, unreasonable, without foundation, or in bad faith." Attorney's fees under 11113 are a discretionary matter for the district court to determine. Addis v. Holy Cross Health System Corporation, 1996 WL 379783, *4 (7th Cir.); Johnson v. Nyack Hosp., 964 F.2d 116, 123 (2d Cir. 1992). They are not mandatory. Lancaster General Hospital, 1996 WL 344921 at *16. While Dr. Benjamin's conduct may appear unreasonable in light of his previous state court suits regarding these matters, his claims are not wholly without merit. The Court does not find that Dr. Benjamin's conduct merits an award of attorneys' fees to the Defendants. Accordingly, the Court denies Defendants' Motion for attorneys' fees.

V. Conclusion

For the reasons stated above the Court

(1) GRANTS Defendants' Motion for Summary Judgment on all Counts;

and

(2) DENIES Defendants' request for attorneys' fees.
It is so ORDERED.

/s/_____
MORTON A. BRODY
United States District Judge

Dated this 8th day of August, 1996.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMES BENJAMIN, JR., M.D. Plaintiff v. THE AROOSTOOK MEDICAL CENTER, et al, Defendants	Civil No. 95-0253-B

JUDGMENT

In accordance with the Memorandum of Decision, entered by the Court August 8, 1996, Judgment is hereby entered for the Defendants and against the Plaintiff.

Dated this 8th day of August, 1996.

WILLIAM S. BROWNELL, CLERK

/s/_____
Harriett D. Jefferson
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 9602047

JAMES BENJAMIN, JR., M.D.,
Plaintiff, Appellant,

v.

THE AROOSTOOK MEDICAL CENTER, INC., ET AL.,
Defendants, Appellees.

Before

Selya, Circuit Judge,
Cyr, Senior Circuit Judge,
and Boudin, Circuit Judge.

ORDER OF COURT

Entered June 27, 1997

The motion for a stay of mandate is denied. See Fed. R. App. P. 41(b). Under Supreme Court Rule 13, appellant has 90 days from this court's entry of judgment to file a petition for a writ of certiorari.

By the Court:

/s/_____
Clerk.

[cc: Messrs. Littell, Schelling, St. Louis, Nyhan, Benjamin]

STATUTES

42 U.S.C Section 1981

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full an equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, an exactions of every kind, and to no other.

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modifications, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable
exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Sections 11111, 11112, 11133, 11134 and 11135

Section 11111. Professional review
(a) In general
(1) Limitation on damages for professional review actions

If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section.

(A) the professional review body

(B) any person acting as a member or staff to the body

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action, shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the civil rights act of 1964, 42 U.S.C. 2000e et seg and the Civil Rights acts, 42U.S.C. 1981 et seg. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 4c of the Clayton Act, 15 U.S.C. section 15c [15 U.S.C.A. section 15c], where such an action is otherwise authorized.

(2) Protection for those providing information to professional review bodies Notwithstanding any other provision of Law, no person (whether as a witness or otherwise) providing information to professional review body regarding the competence or professional conduct of a physician shall be held, by reason of

having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) Unless such information is false.

Section 11112. Standards for Professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken-

(1) in the reasonable belief that the action was in the furtherance of quality healthcare,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances and

(4) in the reasonable belief that the action was warranted by the fact known after such reasonable effort to obtain the facts and after meeting the requirement to paragraph (3) A professional review action shall be presumed to have met the preceding standard necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A healthcare entity is deemed to have met the adequate notice and hearing requirement of subsection (a) (3) of the section with respect to a physician if the following conditions are met (or waived voluntarily by the physician)

(1) Notice of proposed action

The physician has been given notice stating-

(A) (i) That a professional review action has been proposed to be taken against the physician,
(ii) reasons for the proposed action,

(B) (i) That the physician has the right to request a hearing on the proposed action,
(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating-

(A) the place, time, and date of the hearing, which date shallnot be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B)-

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)-

(i) before an arbitrator mutually acceptable to the physician and the health care entity,
(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or
(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved

(B) the right to the hearing may be forfeited if the physician fails, without good cause to appear;

(C) in the hearing the physician has the right -

(i) to representation by an attorney, or other person of the physician's choice,
(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associating a statement of the basis for the recommendations, and
(ii) to receive a written decision of the healthcare entity, including a statement of the basis of the decision. A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to

meet the standards of subsection (a)(3) of this section.

Section 11133. Reporting of certain professional review actions taken by health care entities

(a) Reporting by healthcare entities

(1) On physicians

Each healthcare entity which-

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period of longer than 30 days;

(B) accepts the surrender of clinical privileges of a physician-

(i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or

(ii) in return for not conducting such an investigation or proceeding; or

(C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of a physician in the society, shall report to the Board of Medical examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3)

(2) Permissive reporting on other licensed healthcare practitioners

A health care entity may report to the Board of medical examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3) in the case of a licensed

health care practitioner who is not a physician, if the entity would be required to report such information under paragraph (1) with respect to the practitioner if the practitioner were a physician.

(3) Information to be reported

The information to be reported under this subsection is-

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or if known, for surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) Reporting by Board of Medical Examiners

Each Board of Medical Examiners shall report, in accordance with section 11134 of this title, the information reported to it under subsection (a) of this section and known instances of health care entity's failure to report information under subsection (a)(1) of this section.

(c) Sanctions

(1) Health care entities

A health care entity that fails substantially to meet the requirement of subsection (a)(1) of this section shall lose the protections of section 11111 (a)(1) of this title if the Secretary publishes the name of the entity under section 11111(b) of this title.

(2) Board of Medical Examiners

If after notice of noncompliance and providing an opportunity to correct non-compliance, the Secretary determines that the Board of Medical examiners has failed to report information in accordance with subsection (b) of this section The Secretary shall designate another qualified entity for the reporting of information under subsection (b) of this section.

(d) References to Board of Medical Examiners

Any reference in this subchapter to a Board of Medical Examiners includes in the case of a Board in a State that fails to meet the reporting requirements of section 11132(a) of this title or subsection (b) of this section, a reference to such other qualified entity as the Secretary designates.

Section 11134. Form of reporting

(a) Timing and form

The information required to be reported under sections 11131, 11132(a), and 11133 of this title shall be reported regularly (but not less often than monthly) and in such form and manner as the Secretary prescribes. Such information shall first be required to be reported on a date (not later than one year after November 14, 1986) specified by the Secretary.

(b) To whom reported

The information required to be reported under sections 11131, 11132, and 11133(b) of this title shall be reported to the Secretary, or in the Secretary's discretion, to an appropriate private or public agency which has made suitable arrangements with the Secretary with respect to receipt, storage, protection of confidentiality, and dissemination of information under this subchapter.

(c) Reporting to State licensing boards

(1) Malpractice payments

Information required to be reported under section 11131 of this title shall also be reported to the appropriate State licensing board (or boards) in the state in which the medical malpractice claim arose.

(2) Reporting to other licensing boards

Information required to be reported under section 11132(b) of this title shall also be reported to the appropriate State licensing board in the state in which the health care entity is located if it is not otherwise reported to such board under subsection (b) of this section.

Section 11135. Duty of hospitals to obtain information

(a) In general

It is the duty of each hospital to request from the Secretary (or the agency designated under section 11134(b) of this title) on and after the date information is first required to be reported under section 11134(a) of this title-

(1) at the time a physician or licensed health care practitioner applies to be on the medical staff (courtesy or otherwise) of or clinical privileges at, the hospital, information reported under this subchapter concerning the physician or practitioner, and

(2) once every two years information reported under this subchapter concerning any physician or such practitioner who is on the medical staff(courtesy or otherwise) of, or has been granted clinical privileges at, the hospital. A hospital may request such information at other times.

(b)Failure to obtain information

With respect to a medical malpractice action, a hospital which does not request information respecting a physician or practitioner as required under subsection (a) of this section is presumed to have knowledge of any information reported under

this subchapter to the Secretary with respect to the physician or practitioner.

(c) Reliance on information provided

Each hospital may rely upon information provided to the hospital under this chapter and shall not be held liable for such reliance in the absence of the hospital's knowledge that the information provided was false.

MAINE HEALTH SECURITY ACT

2501. Short title

This Act shall be known as the Maine Health Security Act.

2502. Definitions

As used in this chapter, unless the context indicates otherwise, the following words shall have the following meanings.

1. Board. "Board" means the Board of Registration in Medicine or the Board of Osteopathic Examination and Registration.

1-A. Health care practitioner. "Health care practitioner" means physicians and all others certified, registered or licensed in the healing arts, including, but not limited to, nurses, podiatrists, optometrists, chiropractors, physical therapists, dentists, psychologists and physicians' assistants.

2. Health care provider. "Health care provider" means any hospital, clinic, nursing home or other facility in which skilled nursing care or medical services are prescribed by or performed under the general direction or persons licensed to practice medicine, dentistry, podiatry or surgery in this State and which is licensed or otherwise authorized by the laws of this State.

3. Physician. "Physician" means any natural person authorized by law to practice medicine or osteopathic medicine within this State.

4. Professional competence committee. "Professional competence committee" means a committee of members of a professional society or other organization of physicians formed pursuant to state and federal law and authorized to evaluate medical and health care service, or a committee of licensed professionals authorized or privileged to practice in any health care facility, provided the medical society or other organization or the medical staff or the health care facility operates pursuant to written bylaws that have been approved by the governing body of such society, organization or facility.

4-A. Professional review committee. "Professional review committee" means a committee of physicians who are disabled or impaired by virtue of physical or mental infirmity or by the misuse of alcohol or drugs, as long as such committee operates pursuant to protocols approved by the Board of Registration in Medicine.

5. Professional society. "Professional society" means a state professional organization of physicians, surgeons or osteopathic physicians.

6. Action for professional negligence. "Action for professional negligence" means any action for damages for injury or death against any health care provider, its agents or employees, or health care practitioner, his agents or employees, whether based upon tort or breach of contract or otherwise, arising out of the provision or failure to provide health care services.

7. Professional negligence. "Professional negligence" means that:

A. There is a reasonable medical or professional probability that the acts or omissions complained of constitute a deviation from the applicable standard of care by the health care practitioner or health care provider charged with that care; and

B. There is a reasonable medical or professional probability that the acts or omissions complained of proximately caused the injury complained of.

1977, c. 492, 3; 1985, c. 185, 1; 1985, c. 804, 3 to 5.

2503. Hospital duties

The governing body or every licensed hospital shall assure that:

1. Organization of medical staff. Its medical staff is organized pursuant to written bylaws that have been approved by the governing body;

2. Provider privileges. Provider privileges extended or subsequently renewed to any physician are in accordance with that physician's training, experience and professional competence;

3. Program for identification and prevention of medical injury. It has a program for the identification and prevention of medical injury which shall include at least the following:

A. One or more professional competence committees with responsibility effectively to review the professional services rendered in the facility for the purpose of insuring quality of medical care of patients therein. Such responsibility shall include a review of the quality and necessity of medical care provided and the preventability of medical complications and deaths;

B. A grievance or complaint mechanism designed to process and resolve as promptly and effectively as possible grievances by patients or their representatives related to incidents, billing, inadequancies in treatment and other factors known to influence malpractice claims and suits;

C. A system for the continuous collection of data with respect to the provider's experience with negative health care outcomes and incidents injurious to patients, whether or not they give rise to claims, patient grievances, claims suits, professional liability premiums, settlements, awards, allocated and administrative costs of claims handling, costs of patient injury prevention and safety engineering activities, and other relevant statistics and information; and

D. Education programs for the provider's staff personnel engaged in patient care activities dealing with patient safety, medical injury prevention, the legal aspects of patient care, problems of communication and rapport with patients and other relevant factors known to influence malpractice claims and suits; and

4. External professional competence committee. Where the nature, size or location of the health care provider makes it advisable, the provider may, upon recommendation of its medical staff, utilize the services of an external professional competence committee or one formed jointly by 2 or more providers.

1977, c. 492, 3.

2504. Professional societies

Every state professional society shall establish a professional competence committee of its members pursuant to written bylaws approved by the society's governing board. The committee shall receive, investigate and determine the accuracy of any report made to the society of any member physician's acts amounting to gross or repeated medical malpractice, habitual drunkenness, addiction to the use of drugs or professional incompetence.

1977, c. 492, 3.

2505. Committee reports

Any professional competence committee within this State and any physician licensed to practice or otherwise lawfully practicing within this State shall, and any other person may, report the relevant facts to the appropriate board relating to the acts of any physician in this State if, in the opinion of the committee, physician or other person, the committee or individual has reasonable knowledge of acts of the physician amounting to gross or repeated medical malpractice, habitual drunkenness, addiction to the use of drugs or professional incompetence. The failure of any such professional competence committee or any such physician to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Except for specific protocols developed by the board pursuant to Title 32, section 3298, no physician or committee is responsible for reporting misuse of alcohol or drugs or professional incompetence or malpractice as a result of physical or mental infirmity or by the misuse of alcohol or drugs discovered by the physician or committee or with respect to any information acquired concerning misuse of alcohol or drugs or professional incompetence or malpractice as a result or physical or mental infirmity or by the misuse of alcohol or drugs, as long as that information is reported to the professional review committee. Nothing in this section may prohibit and impaired physician from seeking alternative forms of treatment.

1977, c. 492, 3; 1985, c. 185, 2.

2506. Provider reports

A health care provider shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider whose employment or privileges have been revoked, suspended, limited or terminated, together with pertinent information relating to that action. The report shall include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also shall include situations where employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section shall be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any such health care provider to report as required is a civil violation for which a fine of not more that $1,000 may be adjudged.

2507. Society reports

Any professional society within this State which takes formal disciplinary action against a member relating to professional ethics, professional incompetence, moral turpitude, or drug or alcohol abuse shall, within 60 days of the action, report in writing to the appropriate board the name of the member, together with pertinent information relating to the action. The report shall include situations in which membership or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was under investigation or the subject of proceedings and it shall also include situations where membership or privileges have been revoked, suspended, limited or otherwise adversely affected by an act of the health care practitioner in return for the professional society's not conducting

or for its ceasing such investigation proceeding. The report shall include situations under which an individual under society to report as required is a civil violation for which a fine of not more that $1,000 may be adjudged.

1977, c. 492, 3; 1989, c. 462, 2.

2508. Effect of filing

The filing of a report with the board pursuant to this chapter, investigation by the board or any disposition by the board shall not, in and of itself, preclude any action by a hospital or other health care facility or professional society comprised primarily of physicians to suspend, restrict or revoke the privileges or membership of the physician.

1977, c. 492, 3.

2509. Board records

1. Record of physicians. Each board shall create and maintain a permanent record of the names of all physicians licensed by it or otherwise lawfully practicing in this State and subject to the board's jurisdiction along with an individual historical record for each physician relating to reports or other information furnished the board under this chapter or otherwise pursuant to law. The record may include, in accordance with rules established by the board, additional items relation to a physician's record of medical practice as will facilitate proper periodic review of the physician's professional competency.

2. Reports without merit; removal and destruction. Upon determination by the board that any report submitted to it is without merit, the report shall be removed from the physician's individual historical record and destroyed.

3. Forms; acceptance of other forms. The board shall provide forms for filing reports pursuant to this chapter. Reports submitted in other forms shall be accepted by the board.

4. Disclosure to physician. A physician shall be provided with a written notice of the substance of any information received pursuant to this chapter and placed in his individual historical record.

5. Examination of records by physician; response to information. A physician or his authorized representative shall have the right, upon request, to examine the physician's individual historical record which the board maintains pursuant to this chapter, and to place into the record a statement of reasonable length of the physician's view of the correctness or relevance of any information existing in the record. The statement shall at all times accompany that part of the record in contention. This subsection shall not apply to material submitted to the board in confidence prior to licensure by the board.

6. Court action for amendment or destruction. A physician shall have the right to seek through court action pursuant to the Maine Rules of Civil Procedure the amendment or destruction of any part of his historical record in the possession of the board.

7. Destruction of information within 5 years. Except as to information relating to biographical background, education, professional training and practice, prior disciplinary action by any entity or that which the board shall destroy information in a physician's historical record unless the board has initiated a proceeding for a hearing upon the information within 5 years of its placement into the historical record.

1977, c. 492, 3.

2510. Confidentiality of information

1. Confidentiality; exception. Any reports, information or records received and maintained by the board pursuant to this chapter, including any material recieved or developed by the board during an investigation shall be confidential, except for information and data that is developed by the board during an investigation shall be confidential, except for information and data that is developed or maintained by the board from reports or records received and maintained pursuant to this chapter or by the board during an investigation and that does not identify or permit identification of any patient or physician; provided that the board may disclose any confidential information only.

A. In a disciplinary hearing before the board or in any subsequent trial or appeal of a board action or order relating to such disciplinary hearing;

B. To governmental licensing or disciplinary authorities of any jurisdiction or to any health care providers located within or outside this State which are concerned with granting, limiting or denying a physician's hospital privileges, provided that the board shall include along with the transfer an indication as to whether or not the information has been substantiated by the board;

C. As required by section 2509, subsection 5;

D. Pursuant to an order of a court of competent jurisdiction; or

E. To qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any patient or physician is first deleted.

2. Confidentially of orders in disciplinary proceedings. Orders of the board relating to disciplinary action against a physician, including orders or other actions of the board referring or scheduling matters for hearing, shall not be confidential.

3. Availability of confidential information. In no event may confidential information received, maintained or developed by the board, or disclosed by the board to others, pursuant to this chapter, or information, data, incident reports pursuant to this chapter, be available for discovery, court subpoena or introduced into evidence in any medical malpractice suit or other action for damages arising out of the provision or failure to provide health care services. This confidential information includes reports to and information gathered by a professional review committee.

4. Penalty. Any person who unlawfully discloses such confidential information possessed by the board shall be guilty of a Class E crime.

5. Physician-patient privilege; proceedings by board. The physician-patient privilege shall, as a matter of law, be deemed to have been waived by the patient and shall not prevail in any investigation or proceeding by the board acting within the scope of its authority, provided that the disclosure of any information pursuant to this subsection shall not be deemed a waiver of such privilege in any other proceeding.

6. Disciplinary action. Disciplinary action by the Board of Registration in Medicine shall be in accordance with Title 32, chapter 48; disciplinary action by the Board of Osteopathic Examination and Registration shall be in accordance with Title 32, chapter 36.

1977, c. 492, 3; 1977, c. 694, 384, eff. July 1, 1978; 1985, c. 185, 3.

2511. Immunity

Any person acting without malice, physician, health care provider, professional society or member of a professional

competence committee, professional review committee or any board or appropriate authority is immune from civil liability:

1. Reporting. For making any report of other information available to any board, appropriate authority, professional competence committee or professional review committee pursuant to law;

2. Assisting in preparation. For assisting in the origination, investigation or preparation of the report or information described in subsection 1; or

3. Assisting in duties. For assisting the board, authority or committee in carrying out any of its duties or functions provided by law.

1977, c. 492, 3; 1985, c. 185, 4; 1985, c. 193; 1985, c. 737, A, 59, eff. April 18, 1986; 1985m c, 804, 7; 1987, c. 402, B, 20, eff. June 24, 1987; 1987, c. 646, 5.

DISTRICT OF MAINE

COMPLAINT SHERMAN ANTI-TRUST
Damages For Monopolizing Part of Trade, Service
or Commerce (15,USCS 2, 14, 15, & 26)

Malicious Abuse
of Report
(18 U3CS 871 et seq.) (28 USCS 1343 & 42 USCS 1981, 1983)

Now comes Plaintiff, James Benjamin, Jr., M.D., the above named Plaintiff, Pro Se, and complains against Defendants, The

Aroostook Medical Center, Inc., Arthur R. Gould Memorial Hospital Division, and each of them, as follows:

COUNT ONE

Jurisdiction of this Court is invoked by the anti-trust laws of the United States of America, specifically Title 15 United States Code Sections 2 14, 15 and 26 as anended; and Title 28 Code Section 1343, as amended. Further, this action arises under the United States Constitution, particularly the provisions of -the Fifth and Fourteenth Antendments to the Constitution of the United States, and under federal law, particularly 28 USCS 1343 and the Civil Rights Act, Title 42 of the United States Code, Sections 1981 and 1983. Jurisdiction is conferred on this court under the constitutional and statutory provisions cited hereinabove, plus 18 USCS 871, et seq.

Further, this action arises under additional United States Constitution provisions as follows: Article 1, Section 9, Clause 3; Article 1, Section 10, Clause 1, and provisions under the First, Eighth and With Amendments.

Defendant, The Aroostook Medical Center, Inc., and its agent and servants transact business within the State of Maine and may be found there, and has agents in said state and venue of this Court is established as follows: Defendant Is a nonprofit corportation, organized and existing under the laws of the State of Maine, dedicated to the vital public use of serving the sick and injured, and deriving its funds in good measure from public sources, including federal funds from the United States government Defendant operates The Aroostook Medical Center, Arthur R. Gould Hospital Division at 140 Academy Street in the City of Presque Isle, County of Aroostook, State of Maine.

Defendant from on or about March 1, 1992, to date, has received approximately the sum of $1,706,040.00 in federal

insurance funds in support of the Hospital. Defendant Hospital also receives funds from the City of Presque Isle, Maine, Municipal Employees Health Trust ($55,800.00) and from the State of Maine ($867,720.00), the exact amounts of which funds are unknown to Plaintiffs.

At all times herein mentioned, the Defendant Hospital has operated and does operate as a charitable organization supported to a substantial degree by charitable contributions solicited from the general public by tax exemptions, and by public subsidary from the State of Maine under the provisions of Title 13-B, MRSA of the State of Maine.

That Defendant Hospital is a "quasi-public" agency in that it is presently receiving public, charitable benefits, that It is sufficiently incorporated into a governmental plan for providing hospital facilities and health care services to the public, as follows, to-wit:

1. Is licensed by the State of Maine, Title 22, section 1811 of Chapter 405, Maine General Statutes, as amended;
2. Receives Medicare and Medicaid payments pursuant to a State Plan;
3. Charitable gifts, donations, bequests, interest, and endowment funds, are received;
4. Subject to Title 22, Section 255, Chapter 101, Maine Statutes for "Coordination of health services funded through state and federal funds";
5. Subject to regulation under terms and conditions of the "Maine Certificate of Need Act of1978", Title 22, Chapter 103, Sections 301, 302, 303, 304-A et. seq. as amended, and under the requirements of the National Health Planning and Resources Development Act of 1974, Public Law 93641 and its accompanying regulations, as amended;
6. That said Defendant Hospital is subject to regulations of the State of Maine Health Care Finance Commission as made and provided by Title 22, Chapter 107, Section 396 and sub-parts, as amended, of the Maine General Statutes. That regulations concern financial requirements

of hospitals, rates for service users must be related to costs, rates must be set without preference or discrimination, and that excess charges are prohibited. Further, that hospital base year financial requirements are subject to allowable costs under the Medicare program, established pursuant to the United States Social Security Act, Title XVIII, as amended;

7. That Defendant Hospital is subject to file annual reports with the Maine Health Care Finance Commission pursuant to Title 22, Chapter 107, Section 396-E of the Maine General Statutes, as amended;

8. That Defendant Hospital is entitled to Charity Care revenue deductions in accordance with the Federal Hill Burton Program, at 42 Code of Federal Regulations, Section 124.506, as revised, and made and provided for in Title 22, Chapter 107, Section 296-F of the Maine General Statutes, as amended;

9. That said Defendant Hospital has received or is eligible to receive federal and state funds under the Hill-Burton Act (42 USC Sections 291 et. seq.)

10. That it is the intent of the Maine Legislature "to assure eyual access to" health services by coordinating health services paid for by the state and federal funds "through existing facilities" in a specified "geographic area," Title 22, Section 255, Chapter 101. Such services include, among other things, services by "the United States Older Americans Act, ASPDT of Title III," as amended.

III

Plaintiff, James Benjamin, Jr., M.D., is an African-American, and at all times mentioned is a physician licensed to practice in the State of Maine; and, is engaged in the practice of Medicin in the Presque isle, Maine area and in the surrounding communities of said City. Plaintiff specifically renders internal medicine services to patients upon demand. Most of the products and

supplies sold and delivelered to Plaintiff for use in his medical practice are manufactured in various parts of the United States and shipped to the State of Maine in interstate commerce.

Further Defendants are as follows:

1) Defendant Maryann Walsh, M.D., is a person and individual, and at all times herein mentioned was a resident of the County of Aroostook, State of Maine, and was elected and acting Chairperson Medical Department of the Aroostook Medical Center, Arthur G. Gould Memorial Hospital division, and that at all times she acted within the course and scope of said duties as Chairperson of said Medical Department.

2) Defendant Ronald Rohe, M.D., a person and individual, and at all times herein mentioned was a resident of the County of Aroostook, State of Maine, member of an Ad Hoc Committee on the Medical Staff of Defendant Hospital, and at all times herein, acted within the course and scope of his duties as a Medical Staf member of said hospital.

3) Defendant Bruce Alexander, M.D.is a person and individual and at all times herein mentioned was a resident of the County of Aroostook, State of Maine, a member of an Ad Hoc Committee of the Medical Staff of Defendant Hospital, and at all times herein, acted within the course and scope of his duties as a Medical Staff member of said hospital.

4) Defendant Michael MacPherson, is a person and individual and at all times herein mentioned was a resident of the County of Aroostook, State of Maine, and acted as Chairman, Board of Directors of said Corporation, and at all time herein men-tioned, acted within the course and scope of his duties as Chairman of the Board of Directors.

5) Defendant Gordon H. Smith, Esq. is a person and individual, and at all times herein mentioned was a

resident of the County of Aroostook, State of Maine, and acted as Medical Staff Attorney and at all times herein mentioned, acted within the course and scope of his authority.

6) Defendant David Peterson, is a person and individual, and at all times herein mentioned was a resident of the County of Aroostook, State of Maine, and was employed as Executive Director of said hospital, and acted within the course and scope of his duties as said Executive Director.

7) Defendant Robert Shaw, M.D., is a person and individual, and at all times herein mentioned was a resident of the County of Aroostook, State of Maine, and was a Medical Staff member of Defendant hospital, and at all times herein mentioned, acted within the course and scope of his duties as a physician and member of said Medical Staff.

8) Defendant David Jones, M.D., is a person and individual, and at all times herein mentioned was a resident of the County of Aroostook, State of Maine, and was employed as a physician by Defendant hospital, and was "Medical Staff President", and at all times herein mentioned acted within the course and scope of his duties as a Medical Staff Member and "Medical Staff President" of said hospital.

9) Defendant Stephen Wood, M.D., is a person and individual and at all times mentioned was a resident of the County of Aroostook, State of Maine, and was a Medical Staff Vice-President and physician for Defendant hospital, and at all times herein mentioned acted within the course and scope of his duties as such physician for said hospital.

10) Defendant Jeannette McBurnie, K.N., is a person and individual, and at all times mentioned was a resident of the County of Aroostook, State of Maine, and was employed as a nurse at Defendant hospital and acted

within the course and scope of her duties as such nurse for Defendant hospital.

11) Defendant Nancy Guerrette, R.N., is a person and individual, and at all times mentioned was a resident of the County of Aroostook, State of Maine, and was employed as a nurse at Defendant hospital and acted within the course and scope of her duties as such nurse for Defendant hospital.

12) Defendant William.Silber, M.D.r is a person and individual, and at all times mentioned was a resident of the County of Aroostook State of Maine, and was a Medical Staff member of Defendant hospital and at all times herein mentioned, acted within the course and scope of his duties as a physician and member of said Medical Staff

V

Defendant also renders medical services and related health services to patients within the State of Maine. Defendant has at all material times had a dominant position within the health care services market in the Presque Isle, Maine area.

VI

As used in Paragraph V, the term "health services" means: (1) Provision of "inpatient and outpatient care to persons sufferifig from illness or disabliity without regard for race, color, creed, national origin, or ability to pay"; (2) Health related research and educational activities; (3) Comprehensive health planning activities; and activities of "an organized and qualified medical staff."

VII

The services described in Paragraph VI are used by "persons suffering from illness or disability without regard to race, color, creed, national origin, or ability to pay," in the State

of Maine. The users who constitute the market for Plaintiff's medicine practices and Defendant's services are of Whites , African-Americans, or mixed racial and/or national ancestry.

VIII

As used herein the health care market consists of persons of every age-range or age-group.

IX

Defendant is the only hospital in the City of Presque Isle, Maine. Their health care services can fulfill the needs for all persons in the communities surrounding said City.

X

In addition, other medical hospitals are located in the City

of Caribou and the Town of Houlton, Maine, but the said hospitals are not convenient to persons residing in the City of Presque Isle, Maine. "

XI

Because of the debilitating nature of illness and disability, persons suffering therefrom must of necessity be serviced by both a physician and an hospital who are closely aligned so as to provide all of the patients' health care needs, both outpatient and inpatient problems.

XII

The Defendant hospital, in the promotion of full and complete health care services to the public disseminates health care information regarding new services being offered by the

medical profession and in some cases regarding the proper way in which to use the services and medication.

XIII

It is the total use of all related medical services, testing experiments, pharmaceutical and nursing caretogether with physician services that facilitates the treatment and care of ill and disabled patients and without the possession of full and complete physician privileges Plaintiff would be and is unable to realize a major source of his patronage and income.

XIV

Said Defendant, as a result of its dominant position in the Presque Isle health care market has been able to command and obtain exclusive rights to hospitalization of the ill and disabled in the Presque Isle area of the State of Maine.

XV

On or about September 15, 1993, Defendant demanded from Plaintiff that he, Plaintiff, voluntarily resign his "privileges at The Aroostook Medical Center effective December 31, 1993." Plaintiff refused to resign his privileges, and on or about November 5, 1993, Defendant hospital failed and refused to (Sic) honor discharge orders for two of Plaintiff's patients. On or about November 6, 1993, Defendant hospital and Defendants David D. Jones, M.D., and Ronald Rohe, M.D., in the course and scope of their duties at said hospital, discriminated against Plaintiff by failing and refusing to admit and treat one of the Plaintiff's emergency patients.

XVI

Defendant Hospital failed and refused to assign Plaintiff to the list of physicians who performed routine EKG readings, (electrocardiogram)

XVII

Defendant hospital, further discriminated against Plaintiff by, on or about Novenber 9, 19931 seizing and assigning three [3] of Plaintiff's hospital patients to other physicians who purported to perform certain medical services on the patients in the Defendants' said hospital in the State of Maine.

XVIII

At the time that Defendant hospital committed the foregoing demand and conduct against Plaintiff, Defendant was the exclusive hospital in the State of Maine for the greater Presque Isle, Maine area.

XIX

Plaintiff continued to admit patients to Defendant hospital, and on or about December 31, 1993, said Defendant hospital "reassigned to other physicians, Plaintiff's then 'current inpatients,' and Defendant then ordered Plaintiff to cease admitting 'new patients' to Defendants' medical facility." Defendant Hospital's Caucasian physicians failed and refused to cover the patients of Plaintiff James Benjamin, Jr., M.D., and the said Caucasian physicians still refuse to cover or treat the patients of said Plaintiff. Further, Defendant hospital has demanded that unless Plaintiff's patients obtain services of other physicians, they will not be treated by the said Defendant hospital. (See Plaintiff's proposed Exhibit "A", referred to herein, and incorporated herein, as part of this complaint)

XX

As a result of the medical actions of the Defendant, Plaintiff was, on December 31, 1993, terminated as a provisional medical staff physician at Defendants' hospital, which position

Plaintiff had worked in since November, 1991.

XXI

The acts of Defendants, its agents and servants were done to monopolize or attempt to monopolize or combine or conspire with another person or persons to monopolize a part of the medical trade, service or commerce among the severalstates in violation of Title 15 United States Code Section 2, as amended.

XXII

Prior to December 31, 1993, hospital inpatient and outpatient services made up a significant portion of Plaintiff's medical practice.

XXIII

When the hospital patient service of caseload was lost in the months of January and February 1994, and thereafter, Plaintiff found himself without hospital based service and practice on which he had based a majority of his medical practice. Not only these patients were lost to Plaintiff, but a substantial number of Plaintiff's office-based patients left Plaintiff's practice because Plaintiff was unable to treat patients in Defendants' said hospital. Thus, Defendant further increased its dominant position in the marketplace by solidifying its exclusive hospital license for its privileged physicians.

XXIV

Plaintiff lost all income from hospital inpatient services from and after December 31, 1993.

XXV

Plaintiff lost essentially all of the hospital based service of patients in the health care area of Presque Isle, Maine, because of his inability to admit new patients to Defendants' hospital. These services were the basis of Plaintiff's medical practice in the greater Presque Isle, Maine area.

XXVI

In an attempt to regain the lost market services, Plaintiff acquired and opened a second and new office in the Caribou, Maine area, near the Canadian border, The new office located as it is, is near the Canadian border, was and is able to attract and provide Canadian patients who travel in interstate commerce. By opening a new office, Plaintiff was forced to expand warehouse and storage space so Plaintiff Gould keep on hand an essential Inventory of medications and supplies to meet his new and increased patient needs. As a result, Plaintiff was forced to increase his expenditures for office, warehouse and storage space and tie up larger amounts of capital in inventory, staff and time.

XXVII

On or about November 22, 1993, Plaintiff, while in process of seeking hospital privileges at Cary Medical Center, in the Caribou, Maine area, the said Cary Medical Center requested Defendant hospital to submit a letter of reference on behalf of Plaintiff. Defendant failed and refused to submit the requested letter.

Cary Medical Center next requested said Defendant hospital to submit specific information relative to Plaintiff. The request was for all medical records and charts used by the said Defendant hospital in denying and justifyiny its failure to grant privileges . Again, Plaintiff full and complete medical staff privilage Defendant failed and refused, and still refuses to submit the requested information to the Cary Medical Center. Thereupon; the said medical center volunteered to send certain of

its qualified medical personnel to review the requested medical charts.

Once again, said Defendant hospital failed and refused, and still refuses to permit Cary Medical Center personnel to review the requested information and charts. Defendant also stated that it would not send the Cary Medical Center any information relative to Plaintiff's performance and qualifications as a physician.

XXVIII

That the conduct and acts herein exhibited by Defendant hospital was and is malicious, vindictive, oppressive and wrongful and, was motivated by a desire to promote and protect Defendant's own competetive economic interests, and was done with a specific intent, and with a wanton disregard of the rights of the Plaintif or the interest of Plaintiff's patients, and was done with malice and the specific intent in injure, damage, and hurt Plaintiff and his patients.

As a direct and proximate result of the above recited behavior, acts and conduct by the Defendant hospital toward Plaintiff, Plaintiff has been damaged, and continues to be damaged in Plain-tiff's profession and in Plaintiff's professional reputation. Further, by reason of the said damage to Plaintiff's profession and to Plaintiff's professional reputation, the Plaintiff has been, is and will sustain additional continuing damages .

That by reason of malice and oppression on the part of Defendants, and each of them, Plaintiff is entitled to punitive damages. By reason of the immediate above-mentioned conduct, Plaintiff has suffered and continues to suffer irreparable injury in Plaintiff's profession, and in Plaintiff's professional reputation

Plaintiff alleges that under all the foregoing and above mentioned circumstances he Is entitled to three-fold the damages sustained and costs of suit, including neccessary and reasonable investigation costs, reasonable expert fees and a reasonable attorney fee.

COUNT TWO

DENIAL OF HOSPITAL PRIVILEGES

XXIX

Plaintiff hereby repeats and realleges each and every word of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XII and XIII of Count One of his Complaintwith the same force and effect as if the same were hereby repeated word for word.

XXX

The number of Physicians on the Medical Staff of Defendant Hospital is forty-five (45), more or less. Of this forty-five (45), Plaintiff is the lone African-American . Nearly 98% of the physicians are Caucasian. No TAMC patients may be treated except by a member of the staff of Defendant Hospital. All physicians bear clinical privileges of some nature. Plaintiff has been illegally stripped and denied clinical privileges without Due Process of Law, because of his Race or Color.

XXXI

On February 12, 1992, Plaintiff-Physician, James Benjamin, Jr., M.D., applied in writing for Medical Staff privileges with Defendant hospital, but the application was rejected by failure to approve the application. That on October 29, 1992, said Hospital purported to approve said application by presenting said Plaintiff with a so-called "provisional appointment to the Active Medical Staff with clinical priviliges in internal medicine."

XXXII

The clinical privileges set out in Paragraph II, supra, were noi full and complete; but, they were "provisional" or tentative, and subsequently, Defendant hospital's Caucasian

physicians failed and refused to cover Plaintiff James Benjamin, Jr., M.D.'s patients, and the said Caucasian physicians still refuse to cover or treat the patients of said Plaintiff, (See Exhibits B, C,D and :E referred to herewith, and incorporated herein as part of this count.

XXXIII

That the rejection of Plaintiff-Physician's application for priviliges was labeled as a "provisional appointment"..,"in order that you (Plaintiff-Physician) may demonstrate proficiency and competency" however, Defendant hospital didnot present any criterion to measure "proficiency" or "competency"

XXXIV

Plaintiff-Physician's clinic;dl privileges, including two hundred and seventy-nine (279) "approved" procedures are in a state of "limbo"

That on October 11, 1993, Defendant Hospital's

Medical Staff Executive Committee recommended that Plaintiff's "current provisional medical privileges be terminated." True and correct copies of the application for staff privileges, the approval and termination are attached, marked Exhibits "F" and "A,", respectively, and incorporated by reference.

XXXV

No grounds have been given for the rejection by Defendant hospital of full and complete clinical privileges to Plaintiff Physician. Plaintiff, James Benjamin, Jr., M.D., on November 14, 1993, sent a telegram of protest to Defendant hospital, wherein he pointed out the failure of the said Aroostook Medical Center to require on-call staff to cover his patients constituted malpractice, Defendant hospital failed even to accord Plaintiff Physician the courtesy of a reply.

XXXVI.

No grounds have been given for the differential treatment by Defendant hospital of Plaintiff-Physician on the night of February 27, 1993, but that similar differential treatment continued and still continues. Plaintiff-Physician, on November 11, 1993, sent a telegram of objection to Defendant hospital wherein he pointed out the interference without cause of said Defendant's Caucasian Physicians with said Plaintiff's patients. This telegram went unanswered.

XXXVII

Plaintiff-Physician is, by the American Board of Internal Medicine, "Designated a Diplomate Certified in the Specialty of Internal Medicine". In the community of Presque Isle, Maine, aside from Plaintiff-Physician, there are four (4) Caucasian internists, all of whom are admitted to the staff of Defendant hospital. Further, Plaintiff is licensed to practice medicine in the additional states of California, Connecticut, and Minnesota.

XXXVIII

That said clinical privileges were unequal in that Caucasian physicians were given a full six-month working test periuu, but Plaintiff-Physician was given a working test period of approximately six weeks.

XXXIX

That the Defendant Hospital further treated Plaintiff-Physician unequal in the following particulars:

a) On the night of February 27, 1993, required Plaintiff Physician to be available to give certain patients medication orders before patients were admitted to his service.

b) On the night of February 27, 1993, said Hospital require said Physician to write non-emergency or acute patient orders earlier than the time required by the Hospital Bylaws.

c) On the night of February 27, 1993, said Hospital require nurses and aides to invade said Physician's medical discretion by having said nurses determine what orders to give paitents, and what time or times to give and execute patient orders.

d) On the night of February 27, 1993, said Hospital, throug its Staff Physician, Stephen Wood, M.D., in the course and scope of his employment, performed multiple personnel evaluations on Plaintiff-Physician at times and places outside a personnel evaluation setting.

e) On the night of February 27, 1993, Defendant Hospital, through its Staff Phys cian, Stephen Wood, M.D., in the course and scope of his employment as Staff Physician, falsely accused said Plaintiff-Physician of a "sloppy practice of medicine"; by falsely stating that Plaintiff Physician was not present and he was in fact, present.

f) On April 1, 1993, Defendant Hospital's nurse, Jeannette McBurnie, in the course and scope of her employment as said nurse, failed and refused to carry out Plaintiff Physician's order to prepare a patient for discharge.

g) On April 26, 1993, Defendant Hospital's nurse, Nancy Guerrette, in the course and scope of her employment as said nurse, failed and refused to carry out Plaintiff Physician's demand to prepare and discharge a patient.

XL

Plaintiff, James Benjamin, Jr., M.D., has all the professional qualifications and skills to be admitted to the full staff membership of Defendant hospital. Documents by Nadine Sidrick, M.D,, Jerome A. RoDinson, M.D., Frank B. Flint, M.D., Peter Bright-Asare, M.D. and Oliver Droppers, M.D. prominent physicians, testifying to the qualifications of the said Plaintiff are

attached, marked Exhibits "G", "H", "I", " 3 ", "K" and "L:", respectively, and incorporated herein by reference.

XLI

Defendant Hospital has never given Plaintiff-Physician just and good cause why his application for full staff membership has been denied.

XLII

Defendant hospital has denied, and is denying, through its racially discriminatory policies and practices, Plaintiff's civil rights under the Constitution of the United States and the Civil Rights Act, Title 42, of the United States Code, Sections 1981 and 1983, "No Bill of Attainder , Impairment of Obligation of Contracts" rights, "Freedom of Assembly" rights, and Free Association rights as made and provided in Article 1, Section 9, Clause 3, Article 1, Section 10, Clause 1, and Constitutional Amendments I, IX, and XIV.

As recent as 31 December, 1993, Defendant hospital, expressl denied Plaintiff-Physician "active staff privileges", and "reassigned"..."his current patients to other physicians," and stated that "Dr. Benjamin is not permitted to admit new patients" further, Defendant hospital has demanded that unless Plaintiff Physician's patients obtain services of otherphysicians, they will not be served by said Defendant hospital. (See Exhibit "A" referred to herewith and incorporated herein and made a part of this Count)

XLIII

That each and every act or action above mentioned, was done by Defendant Hospital with malice and with the specific intent to monopolize a part of the health care, or healing profession for its privileged physicians. Further, Defendant Hospital, its agents, servants and staff physicians, did with malice aforethough

and specific intent, combine and conspire with one another, the said Hospital, together with Defendants DavidD. Jones, M.D., Mary Ann Walsh, M.D., Robert Shaw, M.D., Ronald Rohe, M.D., Bruce Alexander, M.D., William Silber, M.D., Gordon H. Smith, Esquire, Stephen Wood, M.D., Jeannette McBurnie, R.N., and Nancy Guerrette, R.N. and so acted with the specific intent to exercise control and dominion over Plaintiff's hospital medical privileges, and further, the said Defendants, and each of them individually, and in combination, specifically intended to permanently deny and deprtve Plaintiff of medical privileges at the said Defendant Hospital.

That in doing the aforementoned acts, Defendants, and each of them, specifically intended to substantially harm and damage, and did substantially harm and damage, Plaintiff in his health, safety, business and professional calling, career, financial condition, reputation and personal relationships.

The above mentioned acts by Defendants, and each of them, were made knowingly to make it impossible for Plaintiff to practice his internal medicine specialty. Such action was not only arbitrary and capricious, but was a concerted effort on the part of Defendants, and each of them, to deny and to deprive Plaintiff of Plaintiff's patients for Defendants' own profit, and was further directed towards depriving Plaintiff of the right to practice Plaintiff's medical specialty for the personal reasons of these individual defendants acting in concert, and acting individually.

The actions of Defendants, and each of them, and of Defendants' agents, servants and privileged physicians did in fact, result in the denial of Plaintiff's right to privileges, and in the loss of Plaintiff's right to practice his medical specialty at Defendants' Hospital thus resulted in severe and permanent damage to Plaintiff. (See Exhibit "M" referred to herein and incorporated herein and made a part of this Count

The action of Defendant Hospital which resulted in denial of Plaintiff's medical privileges was unreasonable, arbitrary, capricious, and without merit. The said acts, and each of them, were malicious, wanton and willful. The acts denied Plaintiff Due Process and Equal Protection of the Laws in

derogation of Amendment Fourteen to The United States Constitution, and impaired Plaintiff's Right of Contract in violation of Article I, Section 10, Clause 1, of The United States Constitution; and violated Plaintiff's civil rights as made and provided by Title 42 USCS 1981, 1983, and Title 15 USCS 2, 14, 15 and 26.

As a direct and proximate result of the above violations, Plaintiff was damaged in the sum of Ten Million Dollars ($.10,000,000.00) By reason of the malice and oppression on the part of Defendants, and each of them, Plaintiff is entitled to punitive damages; and, Plaintiff is entitled to three-fold the damages sustained and costs of suit, including a reasonable attorney fee, and such other and further relief as to the Court seems just in the premises.

COUNT THREE

MALICIOUS ABUSE OF REPORT

Plaintiff hereby repeats and realleges each and every word of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XII and XIII of Count One of his Complaint with the same force and effect as if the same were hereby repeated word for word.

XLIV

Each and all the acts of Defendant hospital and its agents and servants, and each of them, hereinafter alleyed, were conunitted by the defendants, and each of them, not as individuals, but under the color and pretense of the statutes, regulations, customs and usage of the United States of America.

XLV

On or about December 31, 1993, Defendant Hospital, expressly denied Plaintiff-Physician Nactive staff privileges", and "reassigned"...his current patients to other physicians, and

stated that "Dr. Benjamin is not permitted to admit new patients," and said Defendant further stated that "affected patients may make alternative service arrangements."

XLVI

That on or about January 4, 1994, Defendant-Ilospital, without cause and justification, knowingly reported false information to the National Practitioner Data Bank that because of Plaintiff Physician's "Incompetence, Malpractice Negligence,... Dr. Benjamin (would) not be offered privileges at TAMC (The Aroostook Medical Center)

Defendant-Hospital further reported the following information:

1) That said Plaintiff's clinical performance was substandard
2) That he exhibited a delayed or lack of availability to staff,
3) That his behavior was disruptive,
4) That he avoided Peer Review and engaged in threatening communications to physicians and staff,
5) That his professional conduct was problematic, and
6) That his clinical compentence was marginal and that he displayed an unwillingness to address the issues.

The above information was false, and Defendant-Hospital knew said information was false at the time the above report was rendered. The foregoing report was rendered by Defendant Hospital after Plaintiff refused to sign a convenant not to sue and release The Aroostook Medical Center and its doctors from any "potential legal action".

On or about November 18, 1993, Defendant Hospital prematurely transmitted to the Maine State Medical Board false information pertaining to Plaintiff. As recent as October 26, 1995 the said information was, by the Maine State Medical Board, transmitted across inter-state lines to the Michigan State Medical

Board; and, the contents of this false report was not revealed to Plaintiff Licensee within sixty (60) (days from November 18, 1993 as mandated hy Maine Statutes.

XLVII

In pursuing the above course of action, and in committing the foregoing acts, Defendants and each of them, knowingly used information which they knew, or ought to have, known, was untrue, false, misleading, incomplete, arbitrary and/or capricious; and, further the said reports were transmitted with the specific intent to injure and damage Plaintiff, James Benjamin, Jr., M.D., in his professional medical practice and reputation.

XLVIII

The conduct, and the acts of Defendants, and each of them, assume Plaintiff's guilt as a negligent, incompetent and mal-practitioner, and thus deprived Plaintiff of the following rights, privileges and immunities secured to him by the Constitution of the United States:

a) The right of Plaintiff to be informed of the nature of the accusation against him, as secured to him under the Sixth and Fourteenth Amendments to the Constitution of the United States.

b) The right of Plaintiff not to be deprived of life, liberty or property without due process of law, secured by the Fourteenth Amendment to the Constitution of the United States,

c) The right of Plaintiff not to be compelled in a criminal case to be a witness against himself, as secured by the Fifth and Fourteenth Amendments to the Constitution of the United States.

d) The right of Plaintiff to have a speedy and public trial by an impartial jury as secured by the Sixth and Fourteenth Amendments to the Constitution of the United States.

e) The right of Plaintiff to be confronted with the witness against him as secured by the Sixth and Fourteenth Amendments to the Constitution of the United States.

f) The right of Plaintiff to have the Assistance of Counsel for his: defense as made and provided by the Sixth and Fourteenth Amendments to the Constitution of the United States; and

g) The right of Plaintiff to have compulsory process to obtain witnesses in his favor, as made and provided by the Sixth and Fourteenth Amendments to the Constitution of the United States.

h) Further, the conduct of Defendants, and each of them, subjected Plaintiff to cruel and unusual punishments in violation of the Eighth (VIII) Amendment to the Constitution of the United States.

XLIX

Defendants' course of conduct and acts pursuant thereunder were willful, wanton, without probable cause and with the express and specific intent, design, and purpose to damage and injure Plaintiff; and did damage and injure Plaintiff. By so doing, Defendants, and each of then, perverted the use of legal records and abused the Federal Reporting process, to the discredit of the Court and the Law, and to the great and grevious demands exemplary and punitive damages against Defendants, and each of them in the sum of Ten Thousand Doll.ars ($10,000.00) for each such false act reported, plus general danages.

WHEREFORE, Plaintiff prays for relief on all three counts as setforth in the within and foregoing papers, records and files. Dated: November 9, 1995 171 Academy Street Presque Isle, ME (207) 764-6808 04769

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAMES BENJAMIN, JR., M.D.

PLAINTIFF

vs.

THE AROOSTOOK MEDICAL CENTER, INC., Arthur R. Gould Memorial Ilospital Division, its agents, servants, contractors, medical staff, nurses associated physicians, including but not limited to: David Peterson, Executive Director, Michael MacPherson, Chairman, Board of Directors, Bruce Alexander, M.D., Mary Ann Walsh, M.D., Robert Shaw, M.D., David Jones, M.D., Ronald Rohe, M.D., Gordon Smith, Esq., Medical Staff Attorney, Stephen Wood, M.D., Jeannette McBurnie, K.N., Nancy Guerrette, R.N., William Silber, M.D., and John Does, One through Fifty, and Jane Does, One through Fifty. et.al.

DEFENDANTS

COMPLAINT
SHERMAN ANTI-TRUST

Damages For Monopolizing Part of Trade, Service or Commerce (15,USCS 2, 14, 15, & 26)

Malicious Abuse of Report (18 USCS 871 et seg.) (28 USCS 1343 & 42 USCS 1981, 1983)

AMOUNT IN DEMAND

For jurisdictional purpose, Plaintiff in the above-captioned matter represents that the amount in demand is greater than $30,000,000.00 exclusive of costs and interest.

Dated: November 9, 1995

/s/_____

James Benjamin, Jr, M.D.,
Pro Se 171 Academy Street
Presque Isle, ME 04769
(207) 764-6808

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAMES BENJAMIN, JR., M.D.

PLAINTIFF

vs.

THE AROOSTOOK MEDICAL CENTER, INC., Arthur R. Gould memorial Ilospital Division, its agents, servants, contractors, medical staff, nurses associated physicians, including but not limited to: David Peterson, Executive Director, Michael MacPherson, Chairman, Board of Directors, Bruce Alexander, M.D., Mary Ann Walsh, M.D., Robert Shaw, M.D., David Jones, M.D., Ronald Rohe, M.D., Gordon Smith, Esq., Medical Staff Attorney, Stephen Wood, M.D., Jeannette McBurnie, K.N., Nancy Guerrette, R.N., William Silber, M.D., and John Does, One through Fifty, and Jane Does, One through Fifty. et.al.

DEFENDANTS

COMPLAINT
SHERMAN ANTI-TRUST

Damages For Monopolizing Part of Trade, Service or Commerce (15,USCS 2, 14, 15, & 26)

Malicious Abuse of Report (18 USCS 871 et seg.) (28 USCS 1343 & 42 USCS 1981, 1983)

PRAYER FOR RELIEF

The Plaintiff in the above-entitled action prays that the following relief be granted:

a. Money damages as alleged;
b. Three-fold the damages sustained; c. Costs of suit;
d. Reasonable expert fees;
e. Interest;
f. Reasonable attorney fee;
g. Punitive damages;
h. Equitable relief as follows: and,

1. That Defendant Hospital, its agents, servants, employees and associates be permanently compelled to admit Plaintiff-Physician to Medical Staff membership at Defendant Hospital,
2. The Defendant Hospital, its agents, servants, employees and associates be restrained from excluding or barring Plaintiff from Medical Staff membership at Defendant-Hospital,
3. That Defendant Hospital, its agents, servants, employees and associates be permanently enjoined from treating or discriminating against Plaintiff Physician,
4. An Order to Show Cause issue out of this Court directed to Defendant Hospital, its agents, servants, employees and associates directing them to appear and show cause why a preliminary injunction pendente lite should not issue until the hearing in this matter,
5. That Defendant Hospital be permanently compelled to admit Plaintiff to membership in the Medical Staff at Defendant Hospital,
6. The Defendant Hospital be permanently enjoined and restrained from excluding or barring Plaintiff from membership on Defendant Hospital's Medical Staff,

7. That Defendant Hospital be permanently enjoined and restrained from treating unequally or discriminating against Plaintiff,
8. Un Order to Show Cause issue out of this Court directed to Defendant Hospital, its agents, servants, employees and associates directing them to appear and show cause why a preliminary injunction pendente lite should not issue until the hearing in this matter,
9. Pending further order of this Court, Defendant Hospital, its agents, servants, employees and associates be temporarily enjoined and restrained from excluding and barring from membership on Defendant Hospital's Medical Staff the Plaintiff Physician,
10. Pending further order of this Court, Defendant Hospital, its agents, servants, employees and associates be temporarily enjoined and restrained from excluding and barring from membership on Defendant Hospital's Medical Staff the said Plaintiff Physician,

i. Whatever additional relief this Court finds embraced within the legal and equitable facts and issues of this case.

Dated: November 9, 1995

_____

James Benjamin, Jr., M.D., Pro Se
171 Academy Street
Presque Isle, ME 04769
(207) 764-6808

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMES BENJAMIN, JR., M.D.,

Plaintiff

THE AROOSTOOK MEDICAL CENTER, INC., ET AL.,

Defendants ANSWER OF DEFENDANTS

Defendants, through undersigned counsel, answer Plaintiffs Complaint dated
November 9, 1995, as follows:

COUNT ONE

The allegations in Count I are denied.

II

The Defendant denies the allegations contained in Paragraph II of the Complaint for the reason that said allegations comprised three pages of text, in violation of the Federal Rules of Civil Procedure. Defendants do answer that the Defendant Hospital has received and does receive various funds from Federal, state and local authorities, is licensed by appropriate state agencies and complies with applicable Federal, state and local regulatory schemes.

III

Defendants admit that Dr. Benjamin is an African-American, has been licensed to practice in Maine and are without

knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph III.

Defendants answer the lengthy Paragraph designated IV as follows:

V

Defendants deny the allegations contained in Paragraph designated V insofar as the paragraph makes reference to "Defendant" without specifying which of the multiple Defendants is intended.

VI

Defendants are without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph.

VII

Defendants are without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph.

VIII

Defendants are without knowledge or information sufficient to form a belief as to
the allegations contained in Paragraph VIII.
4.1 Admit. 4.3 Admit. 4.4 Admit. 4.5 Admit. 4.6 Admit. 4.7 Admit. 4.8 Admit. 4.9 Admit. 4. 10 Admit. 4. 11 Admit. 4.

IX

Defendants admit that The Aroostook Medical Center is the only hospital in the City of Presque Isle and deny the remaining allegations in Paragraph IX.

X

Defendants deny the allegations contained in Paragraph X.

XI

Defendants deny the allegations contained in Paragraph XI.

XII

Defendants deny the allegations contained in Paragraph XII.

XIII

Defendants deny the allegations contained in Paragraph XIII.

XIV

Defendants deny the allegations contained in Paragraph XIV.

XV

Defendants deny the allegations contained in Paragraph XV.

XVI

Defendants deny the allegations contained in Paragraph XVI.

XVII

Defendants deny the allegations contained in Paragraph XVII.

XVIII

Defendants admit the allegations contained in Paragraph XVIII.

XIX

Defendants deny the allegations contained in Paragraph XIX.

XX

Defendants admit that on or about December 31, 1993 the Plaintiffs privileges were terminated and deny the: remaining allegations in Paragraph XX.

XXI

Defendants deny the allegations contained in Paragraph XXI.

XXII

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XXII.

XXIII

Defendants deny the allegations contained in Paragraph XXIII.

XXIV

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XXIV.

XXV

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XXV.

XXVI

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XXVI.

XXVII

Defendants deny the allegations contained in Paragraph XXVII.

XXVIII

Defendants deny the allegations contained in Paragraph XXVIII.

AFFIRMATIVE DEFENSES

Defendants assert herein all of the affirmative defenses enumerated at the conclusion of the Answer.

WHEREFORE Defendants demand judgment dismissing Count One of the Complaint, together with their their costs and other appropriate relief, including attorneys' fees.

COUNT TWO

XXIX

Defendants repeat and reallege their answers to the allegations contained in Paragraphs I through XIII with the same force and effect as though set forth fully herein.

XXX

Defendants deny the allegations contained in Paragraph XXX.

XXXI

Defendants deny the allegations contained in Paragraph XXXI.

XXXII

Defendants deny the allegations contained in Paragraph ~CXXII.

XXXIII

Defendants deny the allegations contained in Paragraph XXXIII.

XXXIV

Defendants deny the allegations contained in Paragraph XXXIV.

XXXV

Defendants deny the allegations contained in Paragraph XXXV.

XXXVI

Defendants deny the allegations contained in Paragraph XXXVI.

XXXVII

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XXXVII.

XXXVIII

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAMES BENJAMIN, JR., M.D.

Plaintiff

THE AROOSTOOK MEDICAL CENTER, INC., ArthurR. Gould Memorial Hospital Division, its agents, servants, contractors, medical staff, nurses, associated physicians, including but not limited to : David Peterson, Executive Director, Michael MacPherson, Chairman, Board of Directors, Bruce Alexander, M.D., MaryAnnWalsh, M.D., RobertShaw, M.D., David Jones, M.D., RonaldRohe, M.D., Gordon Smith, Esq., Medical Staff Attorney, StephenWood, M.D., Jeannette McBurnie, R.N., Nancy Guerrette, R.N., William Silber, M.D., andJohnDoes, One through Fifty, and Jane Does, One through fifty, et.al.

Defendants

(CV-95-0253-B) AMENDED COMPLAINT AS OF COURSE

COMPLAINT

F.R.C.P. RULE 15(a) SHERMAN ANTI-TRUST

Damages For Monopolizing Part of Trade, Service or Commerce, Restraint of Trade

(15, USCS 1, 2, 14, 15, 24 & 26)

Malicious Abuse of Report

(18 USCS 871 et seg.) (28 USCS 1343, 1337; FRCP 8(a), 65 & 42 USCS 1981, 1983)

The Plaintiff, in accordance with Rule 15(a), Federal Rules of Civil Procedure, amends the complaint in this action to read as follows :

1.

Plaintiff amends his complaint by striking from it paragraph XLIX in its entirety and inserting in lieu of it the following :

Defendants' course of conduct and acts pursuant thereunder were willful, wanton, without probable cause and with the express and specific intent, design, and purpose to damage and injure Plaintiff; and did damage and injure Plaintiff. By so doing, Defendants, and each of them, perverted the use of legal records and abused the Federal Reporting process, to the discredit of the Court and the law, and to the great and greivous wrong and injury of Plaintiff, by reason thereof, Plaintiff demands exemplary and punitive damages against Defendants, and each of them in the sum of Ten Thousand Dollars ($10,000.00) for each such false act reported, plus general damages of Five Hundred Dollars ($500.00) per day until the report is corrected.

2.

Plaintiff amends the first line of Paragraph XXXII by deleting therefrom the words "Paragraph II, " and inserting in lieu of them the words Paragraph XXXI.

3.

Plaintiff amends his complaint bg adding Count Mumber Four as follows:

COUNT FOUR
" PEER REVIEW AS RESTRAINT
OF TRADE AND ATTEMPTED MONOPOLIZATION OF
PRACTICE "

L.

Plaintiff hereby repeats and reaiieges each and every word of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, andXIV of Count One of his Complaint with the same force and effect as if the same were hereby repeated word for word.

LI

The individual physician Defendants, Mary Ann Walsh, M.D., David D. Jones, M.D., Robert Shaw, M.D., Ronald Rohe, M.D.Bruce Alexander, M.D., William Silber, M.D., and Stephen Wood, M.D., are licensed to practice medicine by the state of Maine, and at all times material herein, practiced together as medical staff physicians at The Aroostook Medical Center. The corporate Defendant, The Aroostook Medical Center (TAMC) is a " quasi-public agency," a non-profit corporation, doing business as TAMC, Arthur R. Gould Hospital, and is the only hospital in the greater Presque Isle, Maine Area.

LII

The individual nurse defendants are Jeanette McBurnie, R.N., and Nancy Guerrette, R.N., and who at all times material herein, practiced together with the said physian defendants at TAMC, and acted within the course and scope of their employment as said nurses at TAMC.

LIII

Individual defendant, Gordon H. Smith, Esquire, the said Medical Staff Attorney for TAMC, at all times material herein,

acted together with the said physician defendants, and the said nurse defendants at TAMC, and the said Hospital Defendant, and he acted within the course and scope of his authority as such Medical-Staff attorney.

LIV

This Count is brought pursuant to Section One and Section Two of the Sherman Act, 15 U.S.C. Sections One and Two. The court has jurisdiction pursuant to 28 U.S.C. 1337.

LV

The relevant line of Commerce is the specialized practice of internal medicine. At all material times Plaintiff was in direct competition with the individual defendants in that the defendant physicians also practiced general, and internal medicine and surgery

and shared fees thereby earned with the other individual physician defendants. The individual nurse defendants and individual defendant attorney Gordon H. Smith also performed their acts together with and in concert with the said individual physician defendants, and they also there by shared and earned fees with the said individual defendant physicians of the defendant Hospital, and were thus, at all material times in direct competition with the Plaintiff.

LVI

The relevant geographic market is Aroostook County, State of Maine. Substantial numbers of people consult plaintiff or defendants for advise and treatment.

LVII

The amount of commerce is substantial. Total internal medicine fees in the relevant market exceed One Million Dollars per year, a Substantial part of which is received from residents of Massachusetts, New Hampshire and Canada. The practice of internal medicine within the relevant market affects interstate commerce, in that a substantial quantity of medical equipment and supplies is purchased from manufacturers in other states, and substantial amounts of income are received from out-of-state sources, such as Medicare, Medicaid, and insurers.

LVIII

Beginning approximately, December 31, 1992, when Defendnant Robert Shaw, M.D., sought disciplinary action against Plaintiff by making false accusations against him; and by filing with TAMC disciplinary committees allegations of disinformation against Plaintiff., (See Exhibit "N" refered to herewith and incorPorated herein as part of this Count); and, continuing through the present, defendants have combined and conspired among themselves and with others to restrain competition in and to monopolize the practice of internal medicine within the relevant market, in violation of Sections One (1) and Two (2) of the Sherman Act.

LIX

In furtherance of the combination and conspiracy, and with the purpose and specific intent of excluding Plaintiff from the market and destroying competition from him, the individual defendants, and each of them have:

A. Attempted to curtail or eliminate plaintiffs internal medicine privileges at the Hospital; and as of December 31, 1993 did cause plaintiff's internal medicine privileges at the Hospital to be terminated; (See Exhibit "A" herewith referred to, and incorporated herein as part of this count);

B. Attempted to cause the Maine State Board of Medical Examiners to take disciplinary action against plaintiff by making false accusations against him; (See Exhibit "O") herewith referred to and incorporated herein as part of this count);

C. Attempted to cause, and have caused, the defendant Hospital to take diclaiplinary action against plaintiff by making false accusations against him;

D. Defamed plaintiff's skill and qualifications as a internal medicine physician within the relevant market;

E. Caused The Aroostook Medical Center physicians to dominate all defendant Hospital policy making committees and offices and to place plaintiff in a false light ;

F. Caused the defendant Hospital to discriminate against plaintiff in the rendition of the services that the defendant Hospital performs for physicians; and, that such discrimination was practiced against plaintiff because of his race or color in derogation of 42 U.S.C.S. 1981, 1983 et seq.;

G. Caused the defendant Hospital to discriminate against plaintiff because he was the " Primary Medical Doctor" to Maine State Select Blue, a Health Maintenance Organization of Maine State Employees, a "prepaid group health plain" in violation of Section 11151, (9)(c) of the Health Care Quality Improvement Act of 1986, (See Exhibit "m" herewith referred to, and incorporated as part of this Count");

H. Caused defendant Hospital to discriminate against plaintiff in the manner of reviewing internal medical cases, in that they caused defendant Hospital not to review and examine internal medical cases, which in effect sheltered their practices from critical review, (See Exhibit "P" referred to herewith and incorporated herein as a part of this Count);

I. Refused to provide other Medical services to patients who consult with plaintiff for internal medical problems, and otherwise prevented plaintiff from treating patients whom they regard as their own;, (See Exhibits "B", "C", "D", and "E", referred to herewith, and incorporated herein as part of this Count);

J. Caused the defendant Hospital to divert patients of plaintiff to other physicians;, (See Exhibits "A", herewith referred to, and incorporated herein as part of this Count); and,

K. Refused to extend normal professional courtesies to Plaintiff in the care of his patients, (See Exhibits "B", "C", "D". and "E" herewith referred to, and incorporated herein as part of this Count.);

L. Paticipated as panel members in hearings concerning plaintiff while they were in direct economic competition with plaintiff in derogation of Tame by-laws and over the objections of Plaintiff. (See Exhibit "Q" herewith referred to and incorporated within as a part of this Count).

LX

The individual defendants have attempted to monopolize the practice of medicine within the relevant market by the acts

described in this paragraph LIX, all with the specific intent of weakening or eliminating competition from plaintiff, and the defendant Hospital has conspired in that attempt. The individual defendants constitute seven of forty-five physicians practicing in Presque Isle, and thereby dominate both the practice of medicine in the relevant market and the policy and practices of the Hospital. By reason of such dominance, and by reason of their predatory practices described above, defendants' attempt to monopolize the practice of internal medicine and has a dangerous probability of success.

LXI

Plaintiff has been damaged in the amount of $500,000 dollars within the four years preceeding the filing of this action.

LXII

Plaintiff will continue to suffer damage, unless defendants are restrained.

LXIII

Defendants' actions have harmed and threaten to harm the general public by interfering with the orderly practice of medicine in the community, by reducing the number of internal medicine practioners practicing in the community, and by depriving patients of the quality of medical care they would receive but for defendants' actions against plaintiff.

WHEREFORE, Plaintiff demands judgment on Count Four as follows :

A. In the amount of $500.000.00 trebled to $1,500,000.00;

B. For injunctive relief prohibiting defendants from restraining competition and attempting to monopolize the practice of internal medicine within the relevant market, and requiring plaintiff's reinstatement to full privileged status on the medical staff of The Aroostook Medical Center;

C. For reasonable attorneys' fees in the amount of follows: $350.000.00;

D. For his costs and disbursements herein;

E. For such other relief as may be appropriate;

Plaintiff amends his Complaint by adding Count Number Five as follows:

COUNT FIVE RESTRAINT OF TRADE

LXIV

Plaintiff hereby repeats and realleges each and every word of Paragraphs I, II, III ,IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, and XIV of Count One of his Complaint with the same force and effect as if the same were hereby repeated word for word.

LXV

The Corporate Defendant, The Aroostook Medical Center, is a "quasi-public agency", a non-profit corporation doing business as TAMC, Arthur R. Gould Hospital and is the only hospital in the greater Presque Isle, Maine area.

LXVI

This: Count is brought pursuant the Sherman Act, 15 U.S.C. Sections One, Two, and Twenty-four. The court has jurisdiction pursuant to 28 U.S.C. 1337.

LXVII

Said corporate Defendant has sole custody and control of all medical records and charts which it used in denying and justifying its failure to grant Plaintiff full and complete medical staff privileges.

LXVIII

Said corporate Defendant has failed and refused to allow Cary Medical Center (The only hospital other than TAMC near practice) to study the medical records and charts relevant to Plaintiff's application for privileges at the Cary Medical Center. Defendant hospital's refusal to send relevant information to the hospital considering Plaintiff's application for privileges directly caused the Plaintiff's application to never be properly considered. (See Exhibit "R" herewith referred to and incorporated with as a part of this Count.) And thus, Defendant hospital directly prevented Plaintiff from obtaining privileges from the Cary Medical Center.

LXIX

On or about November 18, 1993 Defendant hospital prematurely transmitted to the Maine State Medical Board false information pertaining to Plaintiff. As recent as October 26, 1995 the said information was, by the Maine State Medical Board, transmitted across inter-state lines to the Michigan State Medical Board and the contents of this false report was not revealed to Plaintiff licensee within sixty(60) days from November 18, 1993 as mandated by Maine Statues. Failure on the part of the Maine Medical Board to notify Plaintiff of any chargee against him in a timely manner as required by law have been brought to the

attention of the Maine Medical Board on two separate occasions (On or about October 15, 1994 and January 20, 1995). As a result of TAMC's false reports to the Maine State Medical Board, Plaintiff's application for a medical license cannot be considered by the State of Michigan. Thus, as a direct result of Defendant hospital's false reports, Plaintiff's right to earn an income in the state of Michigan has been denied. (See Exhibit "S" herewith referred to and incorporated with as a Part of this Count.)

LXX

Plaintiff has been damaged in the amount of $500,000.00 per year by reason of Defendant's willful prevention of Plaintiff's ability to earn an income.

LXXI

Plaintiff will continue to suffer damage, unless Defendant is restrained.

LXXII

Plaintiff has been damaged as a direct and proximate result of the above recited behavior, acts and conduct by the Defendant hospital in that said behavior, by design, prevents Plaintiff from earning an income through obtaining privileges at another hospital or obtaining a Medical License in another state. Plaintiff continues to be damaged by said Defendant's actions.

WHEREFORE, Plaintiff demands judgment on Count Five as follows:

A. In the amount of $500,000.00 trebled to $1.500.000.00;

B. For injunctive relief prohibiting Defendant from restraining trade and from preventing Plaintiff from

earning an income by requiring Defendant hospital to release all medical records and charts required to fairly consider Plaintiff's future applications for Medical Staff Privileges and requiring Defendant hospital to remove all false information from Plaintiff's record where ever stated;

C. For reasonable attorneys' fees in the amount of $350.000.00;

D. For his costs and disbursements herein;

E. For such other relief as may be appropriate;

Dated: November 24, 1995

/s/_____
James Benjamin Jr., M.D. Pro Se
171 Academy St.
Presque Isle, ME 04769
(207) 764-6808

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMES BENJAMIN, JR., M.D.,

Plaintiff

v.

THE AROOSTOOK MEDICAL CENTER, INC., ET AL.,

Defendants DOCKET NO. 95-253-B

ANSWER OF DEFENDANTS
TO THE AMENDED COMPLAINT DATED NOVEMBER 24, 1995

Defendents answer the Amended Complaint as follows:

1.

Defendants deny the allegations of Paragraph 1 of the Amended Complaint.

2.

Defendants deny the allegations in Paragraph 2 of the Amended Complaint.

3.

Defendants deny the allegations in Paragraph 3 of the Amended Complaint.

COUNT FOUR

L (50)

Defendants repeat and reallege their answers to the allegations contained in Paragraphs I through XIV of the Complaint with the same force and effect as though set forth fully herein:

LI (51)

Defendants admit the allegations in Paragraph 51.

LII (52)

Defendants admit the allegations in Paragraph 52.

LIII(53)

Defendants admit the allegations in Paragraph 53.

LIV (54)

Defendants deny the allegations in Paragraph 54.

LV (55)

Defendants deny the allegations in Paragraph 55.

LVI (56)

Defendants deny the allegations in Paragraph 56.

LVII(57)

Defendants deny the allegations in Paragraph 57.

LVIII(58)

Defendants deny tile allegations in Paragraph 58.

LIX (59)

Defendants deny the allegations in Paragraph 59.

LX (60)

Defendants deny the allegations in Paragraph 60.

LXI (61)

Defendants deny tile allegations in Paragraph 61.

LXII (62)

Defendants deny the allegations in Paragraph G2.

LXIII (63)

Defendants deny the allegations in Paragraph 63.

WHEREFORE Defendants demand judgment dismissing Count Four of the Amended Complaint, together with their costs andother appropriate relief, including attorneys' fees.

COUNT FIVE

LXIV (64)

Defendants repeat and reallege their answers to the allegations contained in Paragraphs I-XIV of the Complaint with the same force and effect as though set forth fully herein.

LXV (65)

Defendants admit tile allegations in Paragraph 65.

LXVI (66)

Defendants deny the allegations in Paragraph 66.

LXVII (67)

Defendants deny the allegations in Paragraph 67.

LXVIII (68)

Defendants deny tile allegations ill Paragraph GS.

LXIX (69)

Defendants deny tile allegations in Pruagraph 69.

LXX (70)

Defendants cicny tiic allegations ill raragraph 7O.

LXXI (71)

Defendants deny tile rillcgntions in Paragraph 71.

LXXII (72)

Defendants deny the allegations in Paragraph 72.

WHEREFORE Defendants demand judgment dismissing Count Five of the Amended complaint, together with their costs and other appropriate relief, including attorneys' fees.

AFFIRMATIVE DEFENSES AS TO ALL COUNTS

The Amended Complaint and the miscellaneous counts contained therein,
fail to state a claim upon which relief can be granted.

2. With regard to any claim alleging defamatory conduct by the Defendants, Defendants herein claim truth as a defense under the Federal and state constitutions illld state statutes and laws.

3. The Amended Complaint is barred by the doctrine of unclean hands. 4. The Amended Complaint is barred by the doctrine oflaches.

5. The Defendants' conduct is privileged under the provisions of the Federal Ilealth Care Quality Improvement Act (42 USC 11101 ct seq.).

6. 7`he Defendants enjoy immunity under state I:i\v, including Titles 2·1, 32
a;!tl ail oii:ci- immunity lan:s nnd tiocrrines.

The i\mcndetl Complaint is ban-ed by the doctrine of waiver and estoppel.

DATED at Portland, Maine h[eine this day (lay of December, 1995.

Christopher D. Nyhan Esq. Bar ffl4O4

t; Penny St. Louis, Esq.

Bar #2303

Attorney for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMES BENJAMIN, JR., MD.

Plaintiff

vs.

THE AROOSTOOK MEDICAL CENTER, INC., Arthur. Gould Memorial Hospital Division, its agents, servants, contractors, medical staff, nurses, associated physicians, including but not limited to: David Peterson, Executive Director, Michael MacPherson, Chairman Board of Directors. Bruce Alexander. M.D., Mary Ann Walsh, M.D., Robert Shaw. M.D.. David Jones, M.D., Ronald Rohe, M.D.. Gordon Smith Esq., Medical Staff Attorney, Stephen Wood M.D. Jeannene McBurnie. R.N.. Nancy Guerrette, R.S. William Silber. M.D., Paul Hamlin, M.D., James Haeberlin, MD., and Albert Hobbs. John Does. Four through Fifty, and Jane Does, One through Fifty, et al.

Defendants

(CV-95-0253-B)
PROPOSED AMENDED COMPLAINT UPON LEAVE OF COURT F.R.C.P. RULE 15(a) SHERMAN ANTI-TRUST

Damages For Monopolizing Part of Trade, Service or Commerce, Restraint of Trade
(15, USCS 1, 2, 14, 15, 24 & 26)

Malicious Abuse
of Report

(18 USCS 871 et seg.) (28 USCS 1343, 1337; FRCP 8(a), 65 & 42 USCS 1981, 1983)

Plaintiff in accordance with Rule 15 (a) Federal Rules of Civil Procedure, and in conformity with the Order of the Court amends the Complaint in this action to read as follows :

Plaintiff amends the caption of his Complaint by joining and adding thereto the following Defendants: Albert Hobbs, formerly John Doe One. Paul Hamlin M.D. formerly John Doe Two, and James Haeberlin M.D., formerly John Doe Three: and by deleting therefrom the words "John Does, One through Fifty", and substituting in lieu; thereof the words "John Does Four through Fifty".

2.

Plaintiff hereby amends Paragraph IV by adding the fbllowiag Sub-paragraphs :

13) Defendant, Paul Hamlin, M.D., is a person and individual and at all times herein mentioned was a resident of the County of Aroostook, State of Maine, and was a Medical Staff Member and employed as Medical Director of Defendant Hospital and at all times herein mentioned acted within the course and scope of his duties as a physician and member of said Medical Staff, and as an agent and servant of said hospital.

14) Defendant, James Haeberlin, M.D. is a person and individual and at all times herein mentioned was a resident of the County of Aroostook, State of Maine, and was a Medical Staff member of Defendant Hospital and at all times herein mentioned acted within the course and scope of his duties as a physician and member of said Medical Staff.

15) Defendant, Albert Ilobbs is a person and individual, and at all times herein mentioned was a resident of the County of Aroostook, State of Maine, and is the current Chairman Board of Directors of the said Defendant Hospital Corporation. and at all times herein mentioned, acted within the course and scope of his duties as Chairman of the Board of Directors.

3.

Plaintiff amends his Complaint by striking from it Paragraph LI in Count Four in its entirety and inserting in lieu thereof the following:

"The individual physician Defendants. Mary Ann Walsh, M.D., David Jones. M.D., Ronald Rohe, M.D., Bruce Alexander. M.D., William Silber, M.D., Stephen Wood M.D. Paul Hamlin M.D., and James Haeberlin M.D. are licensed to practice medicine in the State of Maine. and at all times material herein, practiced together as Medical Staff physicians at the Aroostook Medical Center. The Corporate Defendant, The Aroostook Medical Center (TAMC) is a "quasi-public agency". a non-profit corporation. doing business as TAMC, Arthur R. Gould Hospital, and is the only hospital in the greater Presque Isle. Maine area.

4.

Flaintiff ammds his Complaint by striking from it Sub-paragraph C; of Paragraph LIX in Count Four in its entirety and inserting in lieu thereof the following:

"Attempted to cause and have caused the Defendant Hospital to take disciplinary action against Plaintiff by making false accusations against him, (See Exhibits T (1)), T(2). T(3). T(4) and T(5) here referred to and incorporated herein as part of this Count. "

5.

Plaintiff amends his Complaint by striking from it Sub-paragraph D. of Paragraph LIX' in Count Four in its entirety and inserting in lieu thereof the following:

"Defamed Plaintiffs skills and qualifications as an internal medicine physician within the relevant market, (See Exhibits W and X referred to herein as part of this Count)"

6.

Plaintiff amends his Complaint by deleting from ii Sub-paragraph E. from Paragraph LIX in Count Four in its entirety and inserting in lieu thereof the following:

"Caused the Aroostook Medical Center physicians to dominate all Defendant Hospital policy making committees and offices and to place Plaintiff in a false light, (See Exhibits "AA" and "BB" referred to herewith, and incorporated herein as part Of this Count)":

7.

Plaintiff amends his Complaint hv striking from Sub-paragraph H in Paragraph LIX in Count Four in its entirety and inserting in lieu thereof the following:

"Caused Defendant Hospital to discriminate against Plaintiff in the manner of reviewing internal medical cases, in that they caused Defendant liospital not to review and e?ramine certain internal medical cases. which in effect sheltered their practices from critical review, (See Exhibits P.U. V(1), V(2), Y and Z referred to herewith as part of this Count)

8.

Plaintiff amends his Complaint by correcting the word "seven" in line five (5) of Paragraph LX in Count Four to read

"nine"; Plaintiff hereby deletes the word "seven" and in lieu thereof inserts the word "nine".

9.

Plaintiff amends his Complaint by adding the Sub-paragraph M. to Paragraph LIX' in Count Four as follows: "That Paul Hamlin, M.D., Medical Director of Defendant Hospital joined the combination and conspiracy to monopolize medical practice or attempt to monopolize medical practice by making false complaints to Plaintiffs proctor, Ronald Rohe, M.D., (See E?rhibirs T (1). T(2), T (3), T (4) and T (5) referred to herewith and incorporated herein as part of this Count). Further, Dr. Paul Hamlin filed the false complaint against Plaintiff because Plaintiff sued the said Defendant Hamlin in Caribou Superior Court for more than a quarter of a million dollars in case CV-93-072".

Dated: December 23, 1995.

James Benjamin, Jr., M.D.,Pro Se
171 Academy Sttieet
Presque Isle, Maine 04769
(207) 493-3181

UNITED STATES DISTRICT COURT-
DISTRICT OF MAINE
DOCKET NO 95-253-B

JAMES BENJAMIN, JR., M. D.,

PLAINTIFF

v.

REPLY TO MOTION FOR

THE AROOSTOOK MEDICAL CENTER, INC., ET AL.,

SUMMARY JUDGMENT

DEFENDANTS

PLAINTIFF, JAMES BENJAMIN, JR. M.D., Pro Se, hereby replies to Defendants' "Motion for Summary Judgment on All Claims" as herein after stated:

I. Introduction

This is a Five (5) Count Complaint against The Aroostook Medical Center, Inc. (TAMC), and its agents, servants, medical staff members and associated corporate family.

Jurisdiction of this Court is invoked by the anti-trust laws of the United States of America, specifically Title IS United States Code Sections 2, 14, 15, 24 and 26 as amended; and Title 28 United States Code Section 1343, as amended. Further, this action arises under the United States Constitution, particularly the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, and under federal law, particularly 28 USCS 1343 and the Civil Rights Act, Title 42 of the United States Code, Sections 1981 and 1983. Jurisdiction is conferred on this court under the constitutional and statutory provisions cited here in above, plus 18 USCS 871, ct seq.

Further, this action arises under additional United States Constitution provisions as follows: Article 1, Section 9, Clause 3;

Article I, Section 10, Clause 1, and provisions under the First, Eighth and Ninth Amendments.

Defendants offer no affidavits in support of their Motion. Plaintiff is instead left to respond to adverse counsel's self-serving assertions and twistings of fact. The Depositions cited by Defendants were not even provided to Plaintiff

Extent of the Case

II. The Counts of this case as follows:

Count One, Damages for Monopolizing part of Trade, Service or Commerce

Count Two, Denial of Hospital Privileges,

Count Three, Malicious Abuse of Report,

Count Four, Peer Review as Restraint of Trade and attempted Monopolization, and

Count Five, Restraint of Trade,

Defendants direct their Motion to Three Counts as follows:

"a. Malicious Abuse of Report,"

"b. Plaintiffs Civil Rights Claim ..," and

"c. Plaintiff s Anti-Trust Claims..."

Defendants did not direct their Motion to Count Four, nor Count Five. Since Defendants did not offer either Argument nor affidavits against Counts Four and Five, those Counts are legally deemed to be true and correct and are not at issue.

There is Jurisdiction to hear the Anti-Trust Claim. Jurisdiction is power to act over the parties and over the subject matter. The parties are legally before the Count, and the Hospital and all Defendants transact business, within the State of Maine.

Defendant, The Aroostook Medical Center, Inc., and its agents and servants transact business within the State of Maine and may be found there, and has agents in said state and venue of this Court is established as follows: Defendant is a quasi-public agency (See Defendants' Answer at Paragraph LI (51), organized and existing under the laws of the State of Maine, dedicated to the vital public use of serving the sick and injured, and deriving its funds in good measure from public sources, including federal funds from the United States government. Defendant operates The Aroostook Medical Center, Arthur R. Gould Hospital Division at 140 Academy Street in the City of Presque Isle, County of
Aroostook, State of Maine.

The Health Service test for jurisdiction under the Sherman Act (15 USCS)Section i, deals with matters related to health services: (1) Do patients travel in interstate commerce? (2) Are administered and prescribed drugs or anesthesiology supplies manufactured out of state? (3) Does the Hospital receive pay from third-party insurers and payers who are out of state?, and (4) Are training programs for physicians and other personnel from out-of-state universities and institutes?

Patients treated by both Plaintiff and Defendants travel over interstate roads and the airways from Canada, surrounding states and the military service; and some patients travel to and from Florida and other "retirement states."

Drugs and supplies are shipped in from numerous out-of-state sources., e.g., New Jersey, Massachusetts, New York, Illinois, etc.

Continuing Education programs for Physicians and other Health-Care Personnel are from many out-of-state universities; e.g., Harvard University, The University of California, Case Western Reserve, and New York State Universities to name a

few, (Mishler v. St. Anthony's Hospital Systems (1981, CA 10 Cole) 694 F2d 1225, 1981-2
CCH Trade Cases. Sect 640342).

Medicare funds are from out-of-state payers, e.g., Massachusetts, New Hampshire, New York, Connecticut, and Vermont, The mice-fixed fees cross states lines. One Hundred (1000/o) percent of Medicare payments to the parties, and Forty-none (49%) percent of Medicaid payments arise from Washington, D.C. One Hundred (100%) percent of Railroad Medicare payments originate in the state of Georgia, (Robinson v. Magovern (1978, WD Pa) 456 F Supp 1000, 1978-2 CCH Trade Cases Sect. 62411).

Camp Va (Veterans)payments in One Hundred (100%) percent originate in Columbus, Indiana. One Hundred (1000/6) percent of Champus, (USPBJ) payments
originate in Columbus, Indiana.

Several private insurance payments originate from out-of-state payers: Massachusetts, Mutual Insurance, Springfield; Massachusetts; New Your Life Insurance, Jamaica, New York, Bankers Life Insurance, Memphis, Tennessee and Hartford, Connecticut.

Examples of other interstate providers used by both Dr. Benjamin and Defendant Hospital are: American Telephone and Telegraph Federal Express, United Parcel Service, the United States Postal Service, and Air Ambulance, 1-800-336-4079.

In an Anti-Trust staff privileges case, the burden on the Plaintiff is to show a logical connection as a matter of practical economics between the Defendants unlawful conduct and interstate commerce. Jurisdiction is established by showing a shifting or diverting which is more than diminimus affect on channels of interstate commerce in terms of fee setting practices, amount of interstate insurance paid, amount of federal funds received, and amount of equipment and services purchased from out-of-state sources, and number of patients using interstate services, (Stone v. William Beaumont Hospital (1981, ED Mich.) 1983-1 CCH Trade Cases, Sect. 65348); Pontius v. Children's Hospital (1982, WD Pa)552 F Supp 1352, 1982-83.

III. Monopoly

A monopoly condemned by the Sherman Anti-Trust Act is the power to fix prices or exclude competition, coupled with polices designed to use or preserve that power, (U.S. V Otter Tail Power Co., D.C. Minn. 331 F. Supp. 54, 58).

Defendant Hospital is the only hospital in the greater area. The State of Maine coordinates state and federal funds through TAMC as an "existing facility" in a specified geographic area" (Title 22, Section 255, Chapter 101). I11 and disabled persons in this area are by nature of their illness forced to go to the nearest hospital which is TAMC. Where the hospital is the only one in the area, the hospital's illegal acts are a violation the Plaintiffs rights and he states a sufficient claim for jurisdiction because color of law, and civil rights issues are raised, (Meredith v Allen County War Memorial Hospital Com (1968 CA 6 Kg) 397 F2d 33, 42 USCS 1981, 1983, et seq.).

Defendant Hospital Monopolized part of the Medical practice and trade as follows: (1) On or about September 15, 1993, TAMC, threatened Plaintiff to resign his medical privileges and release the Hospital and its physicians from legal liability or they would report false information to the State Medical Board if he did not comply with their demands; (2) Defendant Hospital through its agents and servants refused to honor Plaintiff's Medical Orders, and they faded to admit or treat his patients; (3) TAMC refused to assign Plaintiff to the list of physicians who performed routine EKG readings; (4) on November 9, 1993 TAMC seized and assigned three (3) of Dr. Benjamin's patients to other physicians; (5) Again, on December 31, 1993, TAMC "reassigned" all of Dr. Benjamin's in-patient hospital patients to other physicians; (6) TAMC ordered Dr. Benjamin not to admit new patients; (7) previously, TAMC's Caucasian physicians refused to cover Plaintiff's patients; (8) TAMC further stated that Dr. Benjamin's patients would have to obtain services of other physicians in order to be treated at TAMC; (9) and Plaintiff was stripped of all his medical privileges at TAMC.

In the instant case, Defendants' attempted extortion was illegal and in Anti-trust it is a per se violation of the Sherman Anti-Trust Statue, (15 USCS Sections 1, 2); See also, (Pontius v. Children's Hospital (1982, WD Pa) 552 F Supp 1352, where denial of Staff privileges to cardiovascular surgeon by a highly specialized institution was cognizable under anti-trust laws, since there was sufficient nexus between the alleged acts of hospital and other defendants and activities of physician to establish anti-trust jurisdiction; and, a combination, conspiracy and monopolization of trade, effecting interstate commerce is a per se violation of 15 USCS Sees: 1, 2 et seq., (Weiss v. York Hospital(1984, C.4 3 Pa) 745 F2d 786, 105 S Ct. 1777).

Further, in the instant case, an the internal medicine specialists at Defendant Hospital boycotted Plaintiff. They sent copies of their statements to Defendant Hospital and its operating departments wherein they announced they would not "cover Dr. Benjamin's patients' This conduct was a group boycott which interfered with the natural flow of interstate commerce. By its nature and character, this conduct was monopolistic in tendency. This demonstrated behavior continued for upwards of six (6) months. This behavior violated the Sherman Anti-Trust Act not withstanding Dr. Benjamin its primary victim was a single physician. Monopoly, against one person at a time is just as bad as monopoly exercised against many person at once, (See Klor's Inc., Petitioner v. Broadway Hale Stores, Inc. Admiral Corporation, Admiral Distributor's, Inc., et al 359 US 207, 32 ED 2d 741, 79 S Ct 705). This case held "Group boycott of retailer., violate Sherman Anti-Trust Act notwithstanding opportunities for customers to buy in competitive market was not rendered."

TAMC and its family of privileged physicians refused to deal with Dr. Benjamin on any professional medical level e.g., insubordination of nursing care personnel in terms of executing physicians orders, refused to share assign him to routine medical duties such as reading of EKG reports, and this not withstanding that Dr. Benjamin is a Certified Fellow of the prestigious National Board of Internal Medicine, graduate of the Howard

University School of Medicine, and simultaneously held licenses to practice Medicine in four states, California, Connecticut, Minnesota and Maine. The boycott of on-call coverage for Dr. Benjamin by the four Defendant physicians (See exhibit 1) the Defendant Hospital's failure and refusal address the boycott created a naval blockade that made it impossible for Plaintiff to compete with the other TAMC/Internist/Physicians. TAMC, though fraudulent pretense reassigned his patients to other physicians. TAMC refused to treat or service the sick, disabled infirm and elderly because they consulted with Dr. Benjamin on their medical problems, and finally, TAMC barred Dr. Benjamin from entering the Hospital grounds and they even notified the Presque Isle Police Department to of additional violence to be inflicted upon the Plaintiff. The foregoing conduct constituted a concerted refusal to deal and has long been held to be in the forbidden category by both the common law and the Sherman Anti-Trust Act, (See the landmark case of Standaid Oil Co. V United States, 221 US1, 55L'ed 619, 31 S Ct 502; See e.g., Klor's Inc. V Broadway Hale Stores Inc. (1959) 359 US 207, 3 L Ed 2d 741, 79 S Ct 872; United States v General Motors Corp, (1966:) 384 US 127, 162 Ed 2d 415, 86 S Ct 1321; Eastern States Retail Lumber Dealers Asso. V United States, 234 US 600, 58 L ed 1490, 34 S Ct 951; Binderup v. Pallte Echange, Inc. 263 US291, 68 L ed 308, 44 S Ct 96; Fashion Originator's Guild v. Federal Trade Com. 312 US 457, 85 L ed 219, 224, 71 S CT 259; Times-Picayene Publishing Co. v United States, 345 US 594, 625, 97 L ed. 1277, 1299, 73 S XT 872; Northern Pacific R. Co. v United States, 356 US 1, 5, 2 L ed 2d 545, 549, 78 S Ct. 514.

Adverse counsel in a hit and run fashion, suggests that monopoly power on the part of the Defendant Hospital and its Go-Defendants might not be blatant. TAMC is the most powerful employer in Presque Isle, as well as the largest employer. The Defendants know this and are being quite careless with the truth. The Defendant physicians sat on panels that judged their economic competitor, Dr. Benjamin (See Plaintiff's uncontroverted Affidavit Exhibit 1). Clearly, the Defendants had

the power to remove Dr. Benjamin's "provisional privileges". Thus, the power to exclude Dr. Benjamin from competition with themselves. Further, certain of the Defendant physicians had the power to exclude Dr. Benjamin from receipt of on-call coverage. The Defendants also had the power to exclude Dr. Benjamin from obtaining staff privileges at the nearest hospital in the area. All of this constitutes overwhelming monopoly power. Dr. Benjamin Gould not even prevent the Defendants from using their "carte-blanche" to "blackball" or "blacklist" him with false, unsupported allegations at the National Data Bank. (See Exhibit 2) provided no proof of any finding that Dr. Benjamin had committed malpractice, was negligent or that he was incompetent.

IV. ANTITRUST INJURY

There was injury. Alleged in this complaint is a wide combination consisting of Defendant hospital its agents, servants and associated physicians. This combination took from Plaintiff his right to treat patients in all respects. They took his right to have patients receive our patient tests as wed as inpatient tests, x-rays, and all forms of health investigative techniques, they took his freedom of counsel and consultation with both patients and health personnel and they damaged him with lies to the State Medical Board and the National Practitioner Data Bank. They libeled him publicly to patients, news
media the police, and anyone who would listen. They stripped him of all clinical privileges and posted their deeds throughout the halls of the hospital. They contacted his third-party insurance payers such as Medicare and told them that Dr. Benjamin was billing his patients for work he did not perform (See exhibit 3) The injury and the insults were very damaging. The conduct of Defendants interfered with the natural flow of interstate commerce. This conduct had and has by its "nature" and "character," a "monopolistic tendency." As such this conduct is not to be tolerated merely because Dr. Benjamin, the victim is just one more hapless Black man, and whose lone destruction

makes little difference to the Medical profession. Evil and monopoly can as surely thrive by the elimination of such small physician one at a time, as it can by driving them out in large groups. "In recognition of this fact the Sherman Act has consistently been read to forbid all contracts, and combinations "which 'tend to create a monopoly,'" whether the tendency is a creeping one" or "one that proceeds at full gallop," (International Salt Co. v United States, 332 US 392, 396 92 L ed 20, 26, 68 S Ct 12; Klor's v Broadway - Hale Stores, 359 U.S. 207, 3 L ed 2d 741, 79 S Ct 705).

V. COUNT THREE: Malicious Abuse of Report

This claim is supported. Defendants misconstrued this claim. They think this Count is for "Abuse of process." This is not abuse of process. Plaintiff s claim is plain and simple. Defendant Hospital lied to the State Medical Board. Defendant reported false information to the State Board. They said Plaintiff was unavailable and had left town. Defendants knew that on the morning of November 8, 1993, their own employee, Teresa Case, R.N. talked with Dr. Benjamin on the floor of the Progressive Care Unit. Defendant further knew that Dr. Jones saw Dr. Benjamin at TAMC and Plaintiff "was on the floors writing orders on patients ..," so wrote Dr. Jones on November 12, 1993.(See exhibit 4) Dr. Jones then and there discusses Dr. Benjamin's presence with Dr. Wood and Mr. Ginty, Assistant administrator. Jones also discussed the matter with Gordon Smith, Medical Staff Attorney. Defendant Hospital also knew that on November 8, 1993, Dr. Benjamin and Otalene Furtek, R.N. saw and observed the same patient problem, to wit, Dr. Benjamin stated the patient "... had urine that looked like it was infected?" Ms. Furtek answered, "... yes her urine was cloudy ..." Thus, the only rationale conclusion is that the letter to the State Board transmitted false information. Title 24 M.R.S.A., Section 2506 does not mandate the reporting of false information.

On January 4, 1994 TAMC, without cause on justification knowingly reported false information to the National

Practitioner Data Bank by stating that Dr. Benjamin was incompetent, negligent and he was guilty of malpractice.

Defendants do not have any evidence that Dr. Benjamin is incompetent, negligent or that he is a malpractitioner. On the contrary Defendant has and had the following information to the contrary:

1) Peer-Reviews by TAMC Emergency Department. Their own Emergency Department found that in review of Sixteen (16) cases in routine reviews, the "cart" was "appropriate" in fourteen (14) cases.

2) The TAMC Tissue and Blood Utilization Committee reported ten (10) peer-reviews, eight (8) reviews were reported "appropriate" outcome.

3) The Burn Committee reported six (6) peer reviews. The Outcome was 100% "managed appropriately."

4) The Medical Department Review Committee reported that in Fifteen (IS) routine reviews, the "care" was "appropriate" in thirteen (13) cases.

5) The Infection Control Peer-Review Committee perform eight (8) reviews. The report was (100%) managed appropriately;

6) Surgery Department reported one (1) for review - The outcome was positive.

Thus, in fifty-eight (58) Peer - Reviews, the Defendant Hospital knew there was not any incompetent, negligent or mal-practice incidents by the Plaintiff, Dr. Benjamin. The inevitable legal consequence of Defendants' behavior is that they have rebutted any statutory presumption that they may have had pursuant to 42 USC Sees 11111 et seq.

VI. SANCTIONS FOR FAILURE TO REPORT OR FALSE REPORTING

Defendants are confronted with a double problem. In Addition to reporting false information, the Defendants failed to report information to the Medical Examine as follows:

1) Alleged "incompetence/malpractice/Negligence " pursuant to Adverse Action Code 610.2.

2) Alleged " Substandard clinical performance,"

3) Alleged "Delayed a lack of availability to staff,"

4) Alleged "Disruptive Behavior,"

5) Alleged "Avoiding Peer Review Process and Trying to Intimidate those Engaged in Peer Review through Threatening Communications to Physicians and Staff," and

6) Alleged "Finding of Problematic Professional Conduct, Marginal Clinical Competence, and unwillingness to address these issues."

Section 11133 of the Health Care Quality Act is mandatory. The Act in part reads as follows: "Each health care entity ... shall report to the Board of Medical Examiners, in accordance with Section 11134(a) of this title ..."

In the case of Manion v. Evans (1991), M.D. Ohio, 1991 US Dist LEXIS 14986, app dismd (CA 6 Ohio) 986 F2d 1036, 1993-1 CCH trade Cases Sec. 70135, 121 ALR Fed 705, cert den (US) 126 L Ed 2d 40, 114 S Ct 71, it was determined that the defendant hospital and its president were not entitled to immunity because of failure to report certain information as required by 42 USCS Sect 11133 (a)(1)(A). The Court found that the actions taken by the hospital's Medical Staff Executive Committee and the Ad Hoc Hearing Committee were the type of

professional review actions required to be reported to the State Board of Medical Examiners. The Hospital had a duty, pursuant to Section 1113:3 (a)(l) to report the information to the State board of medical examiners. The State board would, in turn, report the information to the national data bank pursuant to Sect. 11133 (b).

Additionally, immunity is not absolute Immunity is limited to damages. Immunity under the Health Care Quality Act does not provide immunity from suit, (Decker v MC Hosp., Inc. (1992, (CA 10 Utall) 982 F 2d 433).

There is not any immunity from injunctive relief, Islami v. Covenant Medical Center (1992, ND Iowa) 822 F Supp 1361.)

Civil Rights Suits ate excluded from immunity, (L Masters v Christ Hosp. 1991, SD Ohio) 791 F Supp 188).

VII Begging the Issue

To ask whether Dr. Benjamin was unavailable in the analysis of Section 11112(a)(l) begs the question. Dr. Benjamin is not charged with being "unavailable." He is charged with "Abandonment of your patients." No action was taken in furtherance of medical care. The evidence by Defendant Dr. Jones is that Plaintiff did not abandon his patients, but that he was writing orders" for his patients. Intermittent care is not abandonment. Negligence and abandonment are different. Abandonment is intentional. Negligence is failure to act reasonably under the circumstances. Defendants did not make reasonable effort to obtain the facts pursuant to Section 11112(a)(2). Plaintiff cannot be charged with one act and then be found guilty of another. Defendant hospital did not make an effort to obtain facts because the facts are a pretense. It does matter whether the act is intentional or non intentional. This presumption is rebutted by the Defendants' ineptness.

Section 111 12(a)(3) is rebutted because Plaintiff never received a notice of what he was charged with in terms of abandonment. Defendant-Hospital On November 10, 1993 informed Appellant by letter that his clinical privileges had been

suspended. The letter did not detail the specific acts or omission alleged to have caused the suspension, nor that the acts or lack of acts harmed any specific patients by name or chart number. There was not specific dates of alleged acts or omissions. The letter did not contain specific acts or omission of alleged substandard care. In its letter, Defendant-Hospital failed to provide its opinion of the patients expected outcome and how the actual existing outcome differed, if at all, because of any act or omission of Plaintiff-Appellant. The letter did not contain an objective standard to which Appellant's treatment had been or would be compared to. Finally, Defendant-Hospital's letter was devoid of any educational plans, any consultation or any monitoring designed to resolve patient care concerns.

Further, the procedure was not fair to Plaintiff in terms of denial of counsel rights and Plaintiff was further denied due process and equal protection in that Defendant Hospital a hearing in eight (8) days , wherein the statute provides, "(A) the place, time, and date of the hearing shall not be less than 30 days after the date of the notice..." (11112 (b) (2) (A) Health Care Quality Improvement Act). Such abbreviated notice violates the law and such conduct is manifestly a lack of due process and equal protection of the laws. The word shall means "must" and is inconsistent with the concept of discretion, (People v. Municipal Court for Los Angeles Judicial District, 149 C.A. 3d., 951, 197 Gal. Rptr. 204, 206).

PLAINTIFF'S CIVIL RIGHTS CLAIM HAS MERIT

Where a physician or patient alleges racial discrimination by a Defendant Hospital the weight of legal authority is that the hospital had engaged in state action under 42 USCS Section 1983 or the Fourteenth Amendment. In Eaten v. Grubbs (1964, CA 4 NC) 329 F2d 71.0, the Court held that although it was not suggested that each of the enumerated factors had enough independent potency to invoke the constitutional requirements, it was enough that the record in its entirety led to the conclusion that the defendant hospital was performing the state's function,

and under constitutional commitments the defendant hospital was bound by the provisions of the Fourteenth Amendments to refrain from the alleged racial discrimination. Three black physicians and two of their patients brought a class action to enjoin the defendant hospital from continuing to deny admission to staff membership and treatment facilities on a racially discriminatory and segregated basis.

It was held in Simians v. Moses H. Cone Memorial Hospital(1963, CA4 NC) 323 F2d 959, cert. den 376 US 938, 11 L Ed 2d 659, 84 S Ct 793, that the defendant hospitals which participated in the Hill-Burton program were sufficiently imbued with "state action" to brign them within the Fourteenth Amendment prohibition against racial discrimination. The plaintiffs were black physicians, dentists, and patients suing on behalf of themselves and other black citizens. The basis of their complaint was that the defendant hospitals had discriminated against them because of their race in violation of the Fourteenth Amendment. Both of the defendant hospitals were nonprofit hospitals owned and governed by boards of trustees.

Where three black nurses employed by a defendant hospital were discharged for eating in a cafeteria maintained by the hospital for the exclusive use of its white employees, the court in Smith v. Hampton Training School for Nurses (1966, CA4 Va) 360 F2d 577, held that the defendant hospital, which had received funds under the Hill-Burton Act, was subject to the Fourteenth Amendment prohibitions against racial discrimination, and the court ordered the elimination of such practices in both the staffing and admitting policies of the defendant hospital.

And where the record disclosed that the defendant had received approximately S2, 250,000 in federal funds for construction under the Hill-Burton Act, the court in Cypress v. Newport News General & Nonsectarian Hospital Asso. (1967, CA4 Va) 375 F2d 648, noted with approval that in a previous case it had found state participation and involvement present, when private hospitals participated in Hill-Burton federal-state aid programs, sufficient to bring them within the purview of the

Fifth and Fourteenth Amendment prohibitions against racial discrimination, the court holding that the circumstances compelled the inference that the defendant private hospital had denied staff privileges to two staff physicians for racially discriminatory reasons.

There is an exclusion of Civil Rights suits from immunity, (Le Masters v. Christ Hospital 1991 SD Ohio 791 F Supp 188).

It was held in the following case involving state licensing of a private hospital that the hospital had engaged in state action under 42 USCS Section 1983 or the fourteenth Amendment.

Where it was alleged that the defendant hospital had violated a decedent's religious beliefs when it administered a blood transfusion against his wishes, the court noted in Holmes v. Silver Cross Hospital (1972, DC 111) 340 F Supp 125, that courts have concluded that when a private party was licensed by the state as well as subjected to pervasive regulations concerning its operations, the actions of that private party would be state action under 42 USCS Section 1983 and the Fourteenth Amendment.

See also Sokol v. University Hospital Inc. (1975, DC Mass) 402 F Supp 1029, supra Section 51b], where the court assumed that the hospital accreditation process involved, and the Accreditation Manual had been so integrated in the licensing, Medicare, and Medicaid programs as to have acquired the character of governmental action under 42 USCS Section 1983.

Under the facts of the following case, where the defendant private hospital was in a monopoly position in the community, the court held that the defendant hospital had engaged in state action under 42 USCS Section 1983.

In Meredith v. Alien County War Memorial Hospital Com. (1968, CA6 Ky) 397 F2d 33, the court noted that the defendant hospital was the only one in the county, and the court held that the defendant hospital's actions involving the dismissal of the plaintiff physician from the hospital's staff constituted actions under color of state law under 42 USCS Section 1983. Here it was held that the hospital served a public function.

Defendants attempted to short circuit Dr. Benjamin's Civil Rights Claims by claiming that they are not "state actors". Such a claim is far from the truth. Remember, TAMC is a "quasi-public agency" as admitted in Defendants' Answer to paragraph LI. Even private citizens can become "state actors". See West v. Atkins, 487 US 42, 101 L Ed 2d40, 108 S Ct 2250. In West the U.S. Supreme Court held that a private physician who contracted with a state prison to attend to the inmates' medical needs was a state actor. He was not on a regular state payroll, but the Court held his "function[s] within the state system, not the precise terms of his employment, determined] whether his actions can fairly be attributed to the state." Id., at 55-56, 101 L Ed 2d 40, 108 S Ct 2250. Further, "Under state law, the only medical care West Gould receive for his injury was that provided by the State. If Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care." Id., at 55, 101 L Ed 2d 40, 108 S Ct 2250. The Defendants are acting pursuant to State law and under color of state law. Peer review is mandated by state law. The mantle of authority to conduct peer review and to report its findings is granted by the State of Maine to all hospital licensed to operate in the State of Maine. These actions must be attributed to the State which grants the power to commit these actions. Further, the State has a basic and profound interest in the policing of hospitals that its citizens have access to. TAMC reports "Pursuant to the provisions of 24 M.R.S.A., Section 2506". Such reporting is under color and pretense of the statutes, regulations, customs and usage of the State OF Maine. The laws used by the Defendants have been ratified by the legislature of Maine and carry with them Constitutional commitments on the part of the users. The Defendants cannot properly use the State Laws to lynch Dr. Benjamin and then proclaim : "We have no obligation to use these laws fairly." Defendants are not absolutely immune from action against their lies and fabrications. See Buckley v.

Fitzsimmons 509 US 125 L Ed 2d 209, 113 S Ct 2606. The nature of State mandated peer review and its reporting is punitive; it effects the recipient's license. Further, State mandated peer review and its reporting are legally binding. Certainly the State has a strong interest when its laws are being enforced. Most importantly, in the instant case, the claimed constitutional deprivation results from a right or privilege having its source in State authority. Clearly, the right or privilege, to conduct peer review and to report its findings, which TAMC enjoys is granted and protected by the State of Maine. The State of Maine would forcefully prevent the United Auto Workers from invading TAMC and conducting peer review of its physicians with the intent of reporting its findings! Whenever private citizen participate in the enforcement of the laws of a State they become state actors and are subject to the same Constitutional integrity as the State . (See Edmonson v. Leesville Concrete Co. 500 US 614, 114 L Ed 2d 660, 111 S Ct 2077.

ATTORNEY FEES

This is not a frivolous suit and Defendants are not entitled to attorney fees. On the contrary, Plaintiff is entitled to costs, attorney fees, research and preparation costs the Sherman Anti-trust Act.

CONCLUSION

Defendants did not address Counts IV and V. On those Counts they apparently plead guilty to the violations of the Sherman Anti-trust Act. Plaintiff therefore concludes that their motion must of needs fail. There are clear genuine issues fact to be decided by the Court on all Five (5) Counts. Defendants' Motion was brought in bad faith under the pretense that Defendants had the right to file their Motion because their time to file had not expired. If Defendants were honest, they would have

requested an enlargement of time to file their mass of dipositive motions. There was no confusion as to when the Dispositive Motions were to be filed. (See Exhibits 5 and 6).

May 22, 1996

Respectfully submitted,

James Benjamin, Jr., M.D., Pro Se
P.O. Box 3491
Ann Arbor, MI 48106

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMES BENJAMIN, JR., MD., PLAINTIFF V. THE AROOSTOOK MEDICAL CENTER., ET AL., DEFENDANTS	DOCKET NO. 95-253-B PRE-TRIAL AFFIDAVIT OF JAMES BENJAMIN JR., M.D.

STATE OF MICHIGAN

COUNTY OF WASHTENAW ss

James Benjamin, Jr., M.D., being first duly sworn deposes and says: That I am eighteen (18) years of age or over;
That I understand the obligation of an oath;

That I am a licensed African American physician and surgeon;
That at al] times mentioned herein, I was engaged in the practice of medicine in the city of Presque Isle, Maine and in the surrounding communities of said city;
That I rendered medical services to patients on demand; and that most of the products and supplies sold and delivered to me for medical use is manufactured m various parts of the United Scares, and is shipped across state lines in interstate commerce;

That in order to avail themselves of my services, my patients navel upon interstate public highways; That some of my patient's came from the provinces of Canada.

That when the defendant Doctors and Defendant Hospital The Aroostook Medical Center joined together and tried to keep Select Blue out of Aroostook Medical Center, They also tried to get rid of me because as Mr. Peterson, the C.E.O. stated to me " You will have to change your stance, we can't have Select Blue in here. They win put caps on everything and reduce the Hospital's income drastically." Mr. Peterson stated, "We want you out of here. The Doc's don't want you either," Mr. Peterson further stated " that this thing won't go away . 1 win see to it that you are isolated and alone by the end of the year."

Mr. Peterson stated publicly that I agreed to a review by three outside physicians; and in that review process, those physicians found me substandard as a physician. The report did not say this. The report cited charts with excellent care. They also stated that " in some charts we thought we detected some evidence of tension between the reviewed physician and other members of the medical staff although if present, this was not explicit but rather implied. On August 18, 1993 i agreed to a teaching review with an Internal Medicine team based on the rules of the Maine Medical Association. Without my Knowledge or participation, the Aroostook Medical Center had on July 21, 1993 , conducted an unauthorized review of thirty-five of my charts, and thirteen stress tests, an in less than a day; an impossible task by any standard including the standards of the defendants in this instant case, as attested to in the April 23, 19% deposition of defendant Dr. Ronald Rohe. I never had the teaching review.

I was accused of having left the area and not bring available to take can of my patients. This is not true. I did not leave town or the area. I have irrefutable evidence to the above facts. I was publicly humiliated and band from the Hospital by lies and subterfuge by Mr.

Peterson and defendant Physicians. Mr. Peterson told me in June of 1993- in the presence of my father- that I was a loose cannon that he had everybody else under control and that by the end of the year, he was going to completely crush me. There was a meeting at the hospital, in which the bylaws were changed . The change in the by-laws enabled The Aroostook Medical Center . to bar my patients from the Hospital for x-rays, blood tests, diagnostic tests of any kind , no facilities were available to my patients as long as they remained my(Dr. Benjamin's) patients. Mr. Peterson talked to the patients directly and told them untrue things about me, witnessed by affidavit of Bernice Beals, (see affidavit) This institution , The Aroostook Medical Center deliberately hurt my reputation, on November 10, 1993, when they thought I would be away at a CME.
Mr. Peterson as CEO, never was willing to discuss with me what was going on. Mr. Peterson and Attorney Smith simply told me that a one method did not work, another one would, this would not go away. I resigned ,conditionally , (letter of resignation attached)from The Aroostook Medical Center on December 30, 1993 because of a mistake made on one of my critically in patients by Dr. Wood on December 29, 1993. I was afraid that one of my patient would be harmed again. My resignation was on December 30m 1993, with a list of reasons why I resigned. I was maligned through reports by Aroostook Medical Center to the National Data Bank, and the Board of Licensure in Medicine, because such reports were false Dr. Haeberlin told me " You

an Black and fag all you people die of hypertension anyway thats whats going to happen to you if you stay here."

Peer Review used as - Just a sham - proceeding is sufficient to anew for an

Antitrust Claim.
The report by the Aroostook Medical Center to the NATIONAL DATA BANK and the BOARD OF LICENSURE IN MEDICINE , stated that I was Incompetent, a

Malpractioner, and Negligent under adverse action code 610.02. The report gives no example of Incompetence. The report gives no example of Malpractice. The report gives no example of Negligence. The report did not list names, times or places concerning alleged incompetence, malpractice or negligent acts on my part.
The foregoing report was rendered by TAMC after I refused to sign a covenant not sue and release TAMC and its doctors from any and an legal action; There had
been fifty-eight(58) peer reviews. The defendant Hospital knew then was not any incompetent, negligent or mal-practice incidents by me (Dr. Benjamin). 1) peer review by TAMC, Emergency Department found that in review of sixteen (16) cases in routine reviews, the "care" was " appropriate" in fourteen (14) cases. 120
The TAMC Tissue and Blood Utilization Committee reported ten(10) peer reviews, eight (8) reviews were reported "appropriate" outcome.
3)The burn committee reported six (6) peer reviews. The Outcome was 100% "managed appropriately."
4) The Medical Department Peer- Review Committee reported that in Fifteen (15)

routine reviews, the "cam" was "appropriate" in Thirteen (13) cases.
5) The Infection Control Peer-review Committee performed eight (%) reviews. The report was (1000/6) managed appropriately. ! i, I, i;
6) The Surgery Department reported (I)for review. The outcome was positive. Dr. Kradzinski Walsh in December 1991 disagreed with my treatment of a very
complicated patient. The external review team retained by the Hospital said my treatment of patient Medical record # 119749 was excellent!! Dr. Kradzinski Walsh said the external review team didn't It now what they were talking about. From Dec. 1991 Dr. Kradzinsky Walsh has insisted that I was trying to steal that patient and other patients and that my care was not excellent on

patient #119749. Dr. Kradzinski Walsh repeated these same allegations during her deposition
of March of 19% even though she claims the external review was Valid. The external
review team report reads as follows, " this patient was admitted 12/6/91 and discharged 12/8/91 this patient was admitted with abdominal pain also had cardiomyopathy and watt status post aortic valve replacement our comments are as follows: the only involvement of the review physician in this case was an on-can physician. The patient had a severe ecardio-myopathy, with ventricular tachycardia and was quite ill on procanamide the problems dealt with were hypo-kalemia and the use of diuretics for congestive failure and this was appropriate. The notice of sign-out on a complicated patient was unclear, the attending physician did sign out and felt the ban was not carried. This was hard to sort out from the chart, and the patient was extremely in. We felt the care was excellent." Dr. Kradzinski Walsh has called me within my hearing "a numb piece ,"
and " a numb nigger ,".

Dr. Hamlin, stated to me in Dec. 1992 that all of the other Physicians were angry because I was accepting Blue Select, that I was billing for services rendered to patients when I was on call. Dr. Hamlin said it did not matter that the other physicians refused to sign out to me and refused to he reached, if I caned to consult on their patients, thus requiring me to spend hours evaluating the chart so as to treat their patients. The other

physicians wanted to bill for as many as 20 hours per week of my time that could have been
saved During the deposition of March 19% Dr. Hamlin stated that he had animus toward me since February of 1993 months before the reviews and other actions began. Dr. Hamlin was the medical director of the Hospital at that time.

r went to Mr. Peterson, the CEO, of die hospital I asked Mr. Peterson

to look into the problem, Mr. Peterson laughed at me. (Present at this meeting was Mr. Peterson, Mr. Benjamin, (my father) and myself Dr. Benjamin.) I then attempted to see Mr. McPherson, Chairman of the Board, who refused to see me. I then went to an the courts in Aroostook County to stay action until Due Process could be observed. No judge was available to hear me. I new to Bangor, Me. and was heard by Judge Blown at. 3 p.m. Judge Brown denied my motion, Judge Brown stated that the issue was Moot the hearing was at one o'clock that day and it was now three o'clock. The time had passed. Judge Brown Stated, " Maybe they won't find against you if they do get a Lawyer and come back to see me,". My motion was denied.

Defendants had dominant position within health care service market in Presque Isle, Maine and, where its services are rendered;

That it is necessary for affiant to work at fully staffed hospital to realize a major source of his patronage and income.
The Aroostook Medical Center is the sole and exclusive hospital in the Presque Area. On or about September 15, 1993, TAMC requested affiant resign his privileges effective 31 December 1993. I refused to resign.
Defendant refused to honor my discharge orders on November 5, 1993; and November 6, 1993, TAMC failed and refused to admit and treat a patient.
TAMC refused to assign Affiant to physician list to perform EKG readings. On or about November 9, 1993, TAMC seized and assigned three (3) of Dr. Benjamin's patients to other Physicians;
On or about December 31, 1993, The Aroostook Medical Center(TAMC) "reassigned" Dr. Benjamin's inpatient hospital patients to other physicians. TAMC ordered me, Dr. Benjamin, not to admit new patients. My rest home patients had to see other physicians because The Aroostook Medical Center excluded me
The Aroostook Medical Center(TAMC) and defendant Physicians thus increased its dominant Market share with its

exclusive State license to operate the hospital license for its privileged physicians. Hospital practice was a significant part of my Practice. My Practice was lost because The Aroostook Medical Center Excluded me from the staff of The Aroostook Medical Center. I attempted to move my practice to Caribou some fifteen miles away . I applied for Privileges at the Cary Medical Center, however, The Aroostook Medical Center, refused to allow Cary Medical Center to review my charts so that my application could be acted upon. The Aroostook Medical Center was attempting

to Merge with The Cary Medical Center during the beginning of these occurrences. Doctor Jones, Doctor Hamlin, and Doctor Rohe . were at that time or previously affiliated with the Cary Medical Center's staff or had privileges at Cary Medical Noted in the interrogatories of David Peterson C.E.O. of the Aroostook Medical Center.

The Aroostook Medical Center dominates the former Mars Hill Hospital the former
Fort Fairfield Hospital and the Facility at Van Buren, They are no longer hospitals as such. The Aroostook Medical Centers failure to anew Cary Medical Center to review
my charts and complete its privileges process cost me access to another staff position so as to reap maximum benefit of my patient load, The hospital portion of my practice equaled at least two thirds of my income. During Doctor Rohe's deposition of April
23 1996, Dr. Rohe asserted that I was hired to take call for everyone . I gained a following and patients began to leave other practices and come to mine. My practice grew to the point when I had 10 to 12 inpatients hospitalized at the Aroostook Medical Center on any given day. I could no longer take cad five or six days per week. Doctor
Rohe complained to me that I had too many patients in The Hospital on Monday and Tuesdays and it created difficulty for him to admit his Oncology patients to The Hospital and The

Hospital lost money with my patients in the way. I had to be incorporated into
the can schedule because so many of the patients were my patients. The Aroostook Medical Center refused to include me in the EKG readings which readings generated at
least $4,000.00 per month as my share. There were many problems and racial incidents but The Aroostook Medical Center failed and refused to correct them.

TAMC's Caucasian physicians refused to cover my hospital patients. TAMC further stated that my patients would have to obtain services of the other physicians in order to be treated at TAMC, (memorandum dated December 31 1993 and directive # 50 copies incorporated herein). An of my staff privileges were terminated by TAMC both inpatient and outpatient. Hospital practice was a significant portion my Practice. This practice was lost because TAMC excluded me from the staff.
I lost an income from hospital patients because of TAMC' refusal to allow me to admit patients. inability to admit patients. TAMC refused to allow Cary to evaluate me.

i opened a second office to offset losses. Incurred new expense in terms of rent, staff, supplies, warehouse and storage + tied up inventory and Capital.
TAMC intended to terminate my hospital privileges. I was damaged by TAMC's conduct. the damage is continuing. I seek treble damage
I was the lone African-American among a staff of forty five (45) physicians.
TAMC discriminated against me in terms of excessive time taken to process my application, in terms of fun rights, and TAMC refused to require other Doctors to cover my patients. The Nursing staff refused to assist me when I had patients in the emergency room.
The above named Defendant Physicians who refused to cover for affiant or cover affiant 's patients were not admonished for their refusals to cover concerning affiant. Refusal to cover or render

medical care to affiant's patients does not promote quality healthcare.

That Defendant, Dr. Jones, was in direct economic competition with my practice. That Defendant, Dr. Robert Shaw, was in direct economic competition with my practice. That Defendant, Dr. Kradzinsky-Walsh, was in direct economic competition with my practice.
That Defendant, Dr. Steven Wood, was in direct economic competition with my practice. That Defendant, Dr. Ronald Rohe, was in direct economic competition with myself on a weekly basis for Hospital beds.
That Defendant, Dr. William Silber, was in direct economic competition with my practice. That Defendant, Dr. Alexander, was in direct economic competition with my practice.
That Defendant, Dr. Paul Hamlin, was being counter-sued by affiant for more than half a million dollars prior to ANY corrective action or complaints being initiated against affiant. Defendant Hamlin's suit was dismissed with prejudice. Affiants counter-suit against
Defendant Hamlin is pending.

An above named Defendants sat on panels wherein they made judgments concerning affiant's economic future. The composition of the hearing committee was clearly a violation of TAMC's by-laws

That on or about November 18, 1993, TAMC prematurely transmitted to the Maine State Board of Registration false information pertaining to affiant. The same information was, by the Board of licensure in Medicine of the State of Maine, subsequently transmitted to the Michigan State Medical Board. The information was knowingly false because TAMC nurses told the administration that affiant saw patients at TAMC at the very times that TAMC claimed that affiant was in California. These facts were known before the letter of

November 18, 1993 was sent to the Board of Licensure in Medicine. That State law did not require TAMC to report false information.
That during February of 1996, I received word that C and S services out of Maine had started a rumor that I had a Medicare related conviction because of fraud and abuse of the Medicare Program. There was an investigation by the office of the Inspector General. The findings of the Inspector General's office was that no such sanctions existed.
This false information went to rest homes, Pulmonary support services, Mars Hills Pharmacy and to Twelve (12) patients, The Medicare Fraud and abuse Unit contacted the rest homes and the pharmacy and informed them that a mistake had been made. (See exhibit) The Medicare fraud and abuse unit also informed the patients , in part that they " apologized if this discrepancy caused you any inconvenience. It should not in

anyway diminish your confidence in providing services referred by Dr. James Benjamin. any past present or future claims for services referred by Dr. James Benjamin win be processed in a normal fashion".

That Defendant Hospital had fun custody and control over certain medical records pertaining to my (Dr. Benjamin's) patients.. Said Hospital failed to release these records to other agencies that I applied to for employment.. One such hospital was CARY MEDICAL CENTER CARY MEDICAL CENTER wrote several letters to TAMC requesting to review my charts that were reviewed by an outside review team. Cary Medical Center offered several alternatives none were acted upon by TAMC. Defendant Jones, a direct competitor, wrote a letter stating that he would give nothing beyond a two paged derogatory letter. (Exhibit Two) Dr. Jones was not the person responsible to write that letter, yet he took that responsibility; so doing, however, afforded Dr. Jones yet another opportunity to malign me.

That Defendant Hospital sent false information to Maine State Board of Licensure in Medicine concerning my performance. TAMC stated that I was not available; this was a lie. In turn the Maine State Board of Licensure in Medicine transmitted this false information to the Michigan State Medical Board on least two separate occasions. As a result of the hospital's conduct I was denied consideration for a license in the state of Michigan.

That I got ugly racist comments from some members of the nursing staff and two members of the Medical staff, Defendants Haeberlin and Walsh. I was told by Mr. Peterson , in the presence of my father, that he would see to it that I would be isolated. Two doctors and one lay person told me that they had been ordered not to associate with me. Several doctors told me they were afraid for their futures if they spoke up because they would be subject to the same treatment I was receiving if they spoke up.

That the TAMC administration did absolutely nothing to stop the racist behavior but, by its conduct, encouraged it to continue.

That all members of affiant's immediate family are African-American.

That members of affiant's immediate family have come by the Aroostook Medical Center

to see affiant.

That on numerous occasions, members of affiant's immediate family have been told, "get out of here" (TAMC) or "You can't wait here for him."

That affiant has been told that his family members are not welcomed at TAMC.

That affiant has witnessed, on dozens of occasions, family members of Caucasian physicians at TAMC circulating an through the Hospital conversing and sight-seeing.

That I am licensed in four states; TAMC's actions adversely affect an my License and any effort on my part to go to any other State.

That an Defendant physicians who refused to cover for affiant are Caucasian.

An above named physicians receive on call coverage for their patients. I did not refuse to cover patients for other doctors. The result was that I was on call 24 hours per day 7 days per week without relief.

That medical and nursing personnel of TAMC refused to carry out my orders. That while at TAMC, I saw one standard of treatment for Caucasian physicians and a
difficult standard of treatment for African -American physicians.

That TAMC granted me, "A provisional appointment to the Active Medical Staff with privileges in internal Medicine" or provisional privileges"

That the Aroostook Medical Center By-laws make no mention of PROVISIONAL PRIVILEGES.

That the caucasian physician at the Aroostook Medical Center do not have "provisional privileges"

That granting " provisional privileges" upon affiant constitutes second-class treatment of African - American physicians.

That TAMC allowed other physicians to handle my patients without even calling me to get to the patient or relate my findings concerning the patients. They did not run appropriate tests; the

patient did not survive the admission under their care. I have the permission of this patients widow to use the name of one such patient.

That I am aware of several deaths due to physicians negligence. The doctors responsible for the deaths of these patients are still on staff, I am not. No patient has died due to negligence on my part.

TAMC's charges of incompetence negligence, and malpractice are untrue and unfounded.

That the external review team was hampered by time to review and I was not present for the review, which is the usual practice. The external review team found excellent treatment on more than one patient in the group of my charts reviewed, by them, (the external review team).

That there is no incompetence documented anywhere; There is no negligence documented anywhere and there is no malpractice documented anywhere concerning myself.

That there is a wide range of DISPARATE TREATMENT towards me as compared with other physicians on staff. I have covered for all of these doctors, but they refused to cover my patients. This conduct was detrimental to the health and welfare of these patients.

NO PHYSICIAN REFUSED TO COVER MY PATIENTS TO PROTECT THE PATIENTS. That refusal to cover my patients was directed as a malicious act against me.

That I)r. Rohe left without coverage for his patients and had his secretary call me to cover them for him for a week. Those patients were without coverage until I agreed to cover them. This occurred less than two weeks before TAMC suspended me. No

suspension of Doctor Rohe was even entertained. This is Disparate treatment. That Dr. Jones missed an adrenal tumor in a patient and got angry at me for sending her back to him. My last knowledge of the patient she had not been taken care of.

That, though my practice grew in number of patients two thirds of my income was from hospitalizations. I lost all hospital income and was unable to survive the onslaught.

That Mr. Michael McPherson and Mr. Albert Hobbs knew what was happening but refused to see me and took no position different to TAMC's.

knowledge and belief.

Dated: April _:: q

1996
The foregoing statements made by me are true. and are based on my own personal

STATE OF MICHIGAN

COUNTY OF WASHTENAW
I

James Benjamin Jr., M.D.. Pro Se

April
1996

Personally appeared the above-named James Benjamin, Jr., M.D. known to me, and made oath that the foregoing affidavit by him and subscribed to before me is true and accurate and based on his personal knowledge.

day of April, Subscribed and sworn to before me, a notary public this

1996.

Notary Public

My Commission Expires

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
DOCKET NO 95-23-253-B

JAMES BENJAMIN JR., M.D., PLAINTIFF v. THE AROOSTOOK MEDICAL CENTER Inc., et al. DEFENDANTS	REPLY TO MOTION FOR PARTIAL SUMMARY JUDGMENT #2

Plaintiff, James Benjamin, Jr., M.D.; Pro Se, replies to Defendants' "Motion for Partial Summary Judgment #2" as follows:

A. Plaintiff is entitled to relief for Civil Rights claims. The Complaint and various Court documents, including Plaintiffs replies in Motions One and Four amply demonstrate that Dr. Benjamin's Civil Rights Claims, which arguments are incorporated into this document .

Since 42 USC Sections 1981 and 1983, superseded the Dred Scott Decision, Plaintiff feels it would be non-judicious use of his time to re-argue Dred Scott v. Sanford, (60 U.S. (19 How.) 393, 15 i, Ed 69); however, I will state that pursuant to Appomattox Court House, The Fourteenth (14th) Amendment, and 42 IISCA Sees. 1981 and 1983, Plaintiff has stated rights, and injuries that are bound to be respected. The cases holding that a doctor may not be stripped of his hospital privileges are legion. The fact that Defendants argue this point, is the best evidence that there exists a genuine issue of fact for a trial, and this matter should not be dismissed on summary judgment hearing.

B. Anti-Trust Damages

Plaintiff has shown evidence of damages, and there is a question of fact for a hearing. Defendants refer to depositions but since he did not serve copies or relevant excerpts of the March 28, 1996, deposition, I find it difficult to address this matter in detail. Counsel's mere displeasure with his ability to elicit the answers he wants, is not ground for a dismissal. 'There is a proper legal procedure for discovery, and this is neither the time nor place to seek discovery. Because Counsel disagrees with the answer, he cannot use his displeasure as grounds for a motion to dismiss.

Defendants are not entitled to Plaintiff's work products. If Defendants wish information that has to be prepared especially for them, they will have to pay for the expense. The mere fact that my method of trying this case is different from Defendants' legal approach, is not ground for a dismissal. At best it raises issues of fact for trial.

As to mitigation of damages, Plaintiff has devoted several hundred hours in preparation of this case. 'this mitigates damages. Furthermore, Defendants admit they intentionally submitted false information. This is a crime. A victim is not required to atone for the deeds of the tort-feasor. Defendant I-Hospital intentionally with held from the Court the tact that they falsely reported that Plaintiff' was incompetent, negligent, and a malpractioner. See "exhibit 1" referred to and incorporated herein as part of this case. "Exhibit I" clearly shows that Adverse Action Code 610.02 is "incompetent/Malpractice/Negligence." Defendant Hospital had in Their possession, die sell-same

document as Plaintiffs "Exhibit No. 1", but they used their Exhibit MFJ 5, because Adverse Action Code 610.02 is not self-explanatory. Why did they hide this information? Plaintiff contends, there a issue of fact for trial.

Respectfully submitted

Date; May 22, 1996

_____

James Benjamin, Jr., M.D. Pro Se
P.O. Box 3491
Ann Arbor, MI 48106

UNITED STATE DISTRICT COURT
DISTRICT OF MAINE
DOCKET NO 95-253-B

JAMES BENJAMIN, JR., M.D. PLAINTIFF v. THE AROOSTOOK MEDICAL CENTER, INC., ET AL., DEFENDANTS	REPLY TO MOTION FOR PARTIAL SUMMARY JUDGMENT ANTI-TRUST DAMAGES

Response of James Benjamin, Jr., M.D., Pro Se, to Defendants' Non-Dispositive

Motion for Partial Summary Judgment No. 3.

Plaintiff's Complaint is legally sufficient. Count One is brought under Title 15 USCS Sections 2, 14 and 26 as amended and Title 28 USCS Section 1343. Count Four is brought pursuant to Title 15 USC Section 1, and Title 28 USCS Section 1337. Count Five is brought pursuant to Title 15 USC Sections 1, 2 and 24 and Tide 28 USC Section 1337.

Defendants, Motion is not directed toward individual Counts, thus, Plaintiff is unable to discern the specificity of Defendants' argument.

COUNT ONE:

Under this Count Plaintiff seeks damages for restraint of part of trade or commerce. Plaintiffs Complaint is not devoid of

necessary elements. Defendants' Section One arguments are not relevant to this Count. Plaintiff contends that certain Defendants

did acts towards him to monopolize or combine or conspire among themselves to monopolize a part of Plaintiff's medical practice. Core and-trust elements are present. Restraint of trade is not an issue in Count One.

Anti-trust: injury is detailed as follows:

There was injury. Alleged in this complaint is a wide combination consisting of Defendant hospital its agents, servants and associated physicians. This combination took from Plaintiff his right to treat patients in an respects. They took his right to have patients receive out patient tests as well as in-patient tests, x-rays, and all forms of health investigative techniques, they took his freedom of counsel and consultation with both patients and health personnel, and they damaged him with lies to the State Medical Board and the National Practitioner Data Bank. They libeled him publicly to patients, news media the police, and anyone who would listen. They stripped him of all clinical privileges and posted their deeds throughout the halls of the hospital. They contacted his third-party insurance payers such as medicare and told them that Dr. Benjamin was billing his patients for work he did not perform. (See exhibit 1) The injury and the insults were very damaging. The conduct of Defendants interfered with the natural now of interstate commerce. This conduct had and has by its "'nature" and "character," a " monopolistic tendency." As such, this conduct is not to be tolerated merely because Dr. Benjamin, the victim is just one more hapless Black man, and whose lone destruction makes little difference to the Medical profession. Evil and monopoly can as surely thrive by the elimination of such small physician one at a time, as it can by driving them out in large groups. "In recognition of this fact the Sherman Act has consistently been read to forbid all contracts, and combinations "which 'tend to create a monopoly, "' whether the tendency is a creeping one" or

"one that proceeds at fun gallop," (International Salt Co. v United States, 332 US 392, 396 92 L ed 20, 26, 68 S Ct 12; Klor's v Broadway - Hale Stores, 359 U.S. 207, 3 L ed 2d 741, 79 S Ct 705).

Group boycotts, or concerted refusals by traders to deal with other traders, are a class of restraint of trade which, from their nature or character, are unduly restrictive, and hence are forbidden by both the common law and the Sherman Anti-Trust Act, and such conduct is not saved by claims that it is reasonable in the specific circumstances, nor by a failure to show that it fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality; such activities, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. A group boycott which interferes with the natural flow of interstate commerce and has by its nature and character a monopolistic tendency is violative of the Sherman Anti-Trust Act notwithstanding that its victim is a single merchant whose business is so small that his destruction makes little difference to the economy; monopoly can surely thrive by the elimination of such small businessmen one at a time, as it can by driving them out in large groups. {SEE KLOR'S V. BROADWAY-HALE STORES 359 US 207)

ANTI-TRUST STANDING

Plaintiff does have standing to bring this case into the Federal Court System His medical practice deals with interstate commerce in terms of patients, services, products and use of the inter-state highways, rails and air-ways. Jurisdiction is conferred on this Court under the constitutional provisions as alleged in the complaint, including 18 USCS 871, et seq. Under 15 USCS 15, "Any person who shall be injured in his business or property by reason of anything forbidden in the Antitrust laws may sue therefor in any district Court of the United States in the district in which the Defendant resides or is found, or has an agent." The parties are legally before the Court, and the Hospital

and an Defendants transact business within the State of Maine, (15 USCS 22, et seq.). This is also predicated upon 15 USCS 14.

The requirement of "standing is satisfied if it can be said that the Plaintiff has a legally protectable and tangible interest at stake in the litigation," (Guidry v. Roberts, La. App., 331. So. 2d 44, 50; Sierra Club v. Morton, 405 US 727, 92 S Ct 1361, 1364, 31 L Ed 2d 636).

Section 24 of the Anti-Trust Act maintains that, "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporations who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."
Section 26 of the of the Sherman Anti-Trust Act maintains that, "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws...In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff." The unified and concerted attacks upon Plaintiff constituted Per Se violations of the And-Trust Laws. A tort-feasor is not flee to complain that he should be entitled to a get away car to secure his wrongful deeds. Here the Defendants argue that only a "single hospital" revoked Plaintiff's clinical privileges, and that therefore, they are not liable. In the instant case, there is more than a single hospital. There is the Defendant Hospital and several separate and distinct Defendant physicians. Further, the narrow-minded scope of Defendants' Motion overlooks the clear evidentiary fact that the Defendant Hospital actively and successfully prevented Plaintiff from obtaining privileges at the only comparable hospital in the

immediate area, Cary Medical Center.(See Exhibit 2). Capacity of members of medical staff to conspire with one another:

In the following case, it was held that the individual members of a hospital's medical staff were capable as a matter of law of conspiring to restrain trade in violation of Section One of the Sherman Act by denying staff privileges to a physician. In Weiss v. York Hospital (1984, CA3 Pa) 745 F2d 786, 1984-2 CCH Trade Cases 66211, 39FR Serv 2d 1444, cert den 470 US 1060, 84 L Ed 2d 836, 105 S Ct 1777, an remand (MD Pa) 628 F Supp 1392, 1986-1 CCH Trade Cases 66971, the court held that the members of the medical staff were capable of conspiracy with each other in violation of Section One of the Sherman Act. See also, Quinn v. Kent General Hospital Inc., (1985, DC Del) 617 F Supp 1226, 1985-2 CCH Trade Cases 66824.

There was a "concerted action" in this case; all of the internal medicine specialists boycotted on-call coverage for Dr. Benjamin, the nursing staff was insubordinate in terms of carrying out Dr. Benjamin's orders. (See Exhibits 3 and 4). Defendants defamed Plaintiff's skills and qualifications as a physician within the relevant market. (See Medicare letters, Exhibit 1). See also, Affidavits of David G. Ferry and Rhonda Philbrick Ferry Exhibits 5 and 6 respectively.

There are separate and distinct entities in this case. These physician Defendants are not employees of TAMC. Their interests are different. The physician Defendants are in the same standing as Dr. Benjamin that is, they are private persons with staff privileges. (Defendants have produced no evidence that suggests otherwise.) They are not agents of TAMC. Their rational motive was to take Dr. Benjamin's patients.

In summary, Plaintiff has shown that he is entitled damages, and that a question of fact is raised concerning the nature, extent and duration of damages are concerned. Plaintiff has also shown that he is entitled to injunctive relief. Defendants' actions were not appropriate, lawful, privileged or hummanized.

Dated May 22, 1996

Respectfully submitted,

/s/_____

James Benjamin, Jr., M.D., Pro Se
P.O. Box 3491
Ann Arbor, MI 48106

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

James Benjamin, Jr., M.D. Plaintiff v. THE AROOSTOOK MEDICAL CENTER, INC., ET ALL., DEFENDANTS	DOCKET NO. 95-253-B REPLY TO MOTION FOR PARTIAL SUMMARY JUDGMENT #4 (RACIAL DISCRIMINATION)

Plaintiff James Benjamin, Jr., hereby replies to Defendants' Motion for Summary

Judgment No 4 as follows:

Defendant Hospital and its physicians did discriminate against Plaintiff because of his race or color. Plaintiff was by Defendant Hospital, approved to perform two hundred and seventy-nine medical procedures. These procedures were labeled "provisional medical privileges." There is not any such thing as, "provisional medical privileges." Defendant physicians failed and refused to cover and treat Plaintiffs patients. Nurses failed and refused to carry out Plaintiff's orders. Other physicians interfered with Plaintiffs patients without cause. Defendant hospital did not require Caucasian physicians to cover Plaintiffs patients, (See Request for Admissions. No. 30. dated February 29.1996). Plaintiff was given a six (6) week working test period as compared with the usual six (6) month period at the end of the "provisional period." (see "Exhibit C" here referred to and

incorporated herein as part of this reply Nurses and physicians gave false information concerning Plaintiff's professional performance, and nurses and aides invaded Plaintiff's medical discretion concerning the property of patient orders.

Defendant hospital stated that Plaintiff should "demonstrate proficiency and competency." Plaintiff's "competency" is well demonstrated by his Peer Review Tracking record as follows:

PEER REVIEW TRACKING
EMERGENCY DEPARTMENT

REASON FOR REVIEW	OUTCOME
1. Death E/D	Care Appropriate
2. Quality of Medical Record	In Compliance
3. Physician Quality	Care Appropriate
4. Admitted within 48 hours of discharge from E/D	Care Appropriate
5. Death in E/D	Care Appropriate
6. Admitted within 48 hours of discharge	Care Appropriate
7. Death within E/D	No Documentation of DNR Status
8. Death in E/D	Care Appropriate
9. Admitted within 48 hours of discharge from E/D	Care Appropriate
10. Physician	Care Appropriate
11. Death in E/D	Care Appropriate
12. Quality of Medical Record	In Compliance
13. Admitted within 48 hours of discharge from E/D	Care Appropriate
14. Admission within 48 hours of discharge from E/D	Care Appropriate
15. Admission within 48 hours of discharge from E/D	E/D assessment incomplete Physician notified
16. Admission within 48 hours of E/D discharge	Care Appropriate

SPECIAL CARE UNIT

1. Review Code 99	Unsuccessful attempt to insert internal pace-maker.
2. Review of Code 99	Revision of Code 99 to call attending

if other then internist

PEER REVIEW TRACKING
BLOOD AND TISSUE UTILIZATION

REASON FOR REVIEW	OUTCOME
1. Transfussion with hemoglobin greater than 9	Reffered to attending for clarification of GI BLEED Site
2. Response From Physician	Response Appropriate
3. Transfusion with hemoglobin greater than 9	Transfusion Appropriate
4. Transfusion of FFFP	Referred to Physician for Rationale
5. Response from Physician	Response Accepted
6. Transfusion of FFP	Transfusion Appropriate
7. Multiple Unit Transfusion	Transfusion Appropriate
8. Transfusion of FFP	Transfusion Appropriate
9. Transfusion with hemoglobin greater than 9	Transfusion Appropriate
10. Transfussion of Platelets	Transfusion Appropriate

BURN COMMITTEE

1. 100% Brun Tx. Review	Care Appropriate
2. 100% Brun Tx. Review	Care Appropriate
3. 100% Brun Tx. Review	Care Appropriate
4. 100% Brun Tx. Review	Care Appropriate
5. 100% Review of Burn Tx.	Managed Appropriately

6.	Multi-System Organ Injury	Managed Appropriately

REASON FOR REVIEW	No issues identified
1. Mortality Review	
2. Mortality Review	No issues identified
3. Readmission within 31 days	Recommed Filing
4. Mortality Review	No issues identified
5. Left Against Medical Advice	No Quality issues
6. Readmission within 31 days	No issues identified
7. Transfer to special care unit from other floor	No issues identifted
8. Referred fiom T & BURC	Request Clarification from Physician
9. Awaiting Physician Response	Physician asked to Respond
10. Physician Response	Information to be filed in file
11. Readmission within 31 clays	Care appropriate
12. Referred by SCU Comm	Revision of Code 99 call procedure
13. Mortality Review	Care Appropriate
14. Readmission within 31 days	Care Appropriate
15. Mortality Review	Care Appropriate
16. Mortality Review	Care Appropriate
17. Referred from T & BURC	Accept Review
OUTCOME	and Findings ofT & BURC

REASON FOR REVIEW	OUTCOME
1. Lown Respiratory	No physician care issues
2. Urinary Tract Infection	Managed Appropriately
3. Lower Respiratory Infection	Managed Appropriately
4. Citrobacter fruendii	Treatment Appropriate
5. Pheumonia	Managed Appropriately
6. Pseudomonas Aeruginosa	Treatment Appropriate
7. Urinary Tract Infection	Managed Appropriately
8. Klebsiella Pneumonia	Managed Appropriately

No physician care issues Managed Appropriately Managed Appropriately Treatment Appropriate Managed Appropriately Treatment Appropriate Managed Appropriately Managed Appropriately

It was held in the following cases, involving alleged racial discrimination by the defendant private hospitals, that the hospitals had engaged in state action under 42 USCS 1983 or the Fourteenth Amendment.

In Eaten v Gruhbs (1964, CA4 NC) 329 F2d 7101 the court held that although it was not suggested that each of the enumerated factors had enough independent potency to invoke the constitutional requirements, it was enough that the record in its entirety led to the conclusion that the defendant hospital was performing the state's function, and under constitutional commitments the defendant hospital was bound by the provisions of the Fourteenth Amendment to refrain from the alleged racial discrimination. Three black physicians and two of their patients brought a class action to in join the defendant hospital from continuing to deny admission to staff membership and treatment facilities on a racially discriminatory and segregated basis.

It was held in Simkins v Moses H. Cone Memorial Hospital (1963, CA4 NC) 323 F2d 959, cert den 376 US 938, Il L Ed 2d

659, 84 S Ct 793, that the defendant hospitals which participated in the Hill-Burton program were sufficiently imbued with "state action" to bring them within the Fourteenth Amendment prohibition against racial discrimination. The plaintiffs were black physicians, dentists, and patients suing on behalf of themselves and other black citizens. The basis of their complaint was that the defendant hospitals had discriminated against them because of their race in violation of the Fourteenth Amendment.

Where three black nurses employed by the defendant hospital were discharged for eating in a cafeteria maintained by the hospital for the exclusive use of its white employees, the court in Smith v Hampton Training School for Nurses (1966, CA4 Va) 360 F2d 577, held the defendant hospital which had received funds under the Hill-Burton Act, was

subject to the Fourteenth Amendment prohibitions against racial discrimination, and the court ordered the elimination of such practices in both the staffing and admitting policies of the defendant hospital.

And where the record disclosed that the defendant hospital had received approximately %2,250,000 in federal funds for construction under the Hill-Burton Act, the court in Cypress v Newport News General & Nonsectarian Hospital Asso. (1967, CA4 Va) 375 F2d 648, noted with approval that in a previous case it had found state participation and involvement present, when private hospitals participated in Hill-Burton federal-state aid programs, sufficient to bring them within the purview of the Fifth and Fourteenth Amendment prohibitions against racial discrimination, the court holding that the circumstances compelled the inference that the defendant private hospital had denied staff
privileges to two staff physicians for racially discriminatory reasons.

In suspending a physician's privileges, a hospital must conform to its by-laws, (See Storrs v Lutheran Hospitals and Homes Soc.(Alaska) 609 P2d 24X in which a quasi-public

hospital was held to have erred in suspending a physician's privileges without a finding of gross negligence, (Bal-kission v Capitol Hill Hospital (1989 Dist Col App) 558 A 2d 304)

A physician's due process right to a fair and meaningful hearing was violated where three of the physician's accusers sat on the hearing panel, (Re zaman 11985) 285 SC 345, 329 SE 2d 436).

X hospital that has been incorporated into a governmental plan for providing hospital facilities to the public is a "quasi-public" entity, (Silver v Castle Memorial Hospital (53 Hawaii 475, 563, 497 P 2d 564, Motion den 53 Hawaii 675, 501 P 2d 60, and cert

den 409 US 1048, 34 E ed 2d 500, 93 S Ct 517). A quasi-public hospital is subject to the same responsibilities as a public hospital with respect to the denial of hospital staff benefits,
(Rao v Auburn General Hospital, 10 Wash ADD 361, 517 P2d 240

It was held that under 42 USCS 1983, a physician who was discharged by failure to process his full staff privileges was denied substantive and procedural due process of law. (Laji v R.E. Thomason General Hospital (1982) CAS TEX) 665 F 2d 724, reh den (1982. ca5 Tex) 67 F 2d 181).
Plaintiffs allegations of discrimination are not conclusory. The evidence is that
defendants intentionally discriminated against Plaintiff. Count Two is well taken, and a Section 42 USCS 1983 claim is valid.
Respectfully submitted

Dated: May 22, 1996 James Benjamin, Jr., M.D. Pro Se

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

James Benjamin, Jr., MD. Plaintiff	
v.	DOCKET NO. 95-253-B
THE AROOSTOOK MEDICAL CENTER, INC., ET AL.,	REPLY TO MOTION FOR PARTIAL SUMMARY JUDGMENT #5
DEFENDANTS	

Plaintiff James Benjamin, Jr., MD. hereby replies to Defendants' "Non-Dispositive Motion No. 5 (Violation of TAMC By-Laws)

This is Essentially a DISHONEST Motion. Count II is made and based upon the Constitution and Laws of the United States. The charge is:

Defendant hospital has denied, and is denying, through its racially discriminatory policies and practices, Plaintiffs civil rights under the Constitution of the United States and the Civil Rights Act, Title 42, of the United States Code, Sections 1981 and 1983. "No Bill of Attainder", "Impairment of Obligation of Contracts" rights, "Freedom of Assembly" rights, and Free Association rights as made and provided in Article 1, Section 9, Clause 3, Article 1, Section 10, Clause 1, and Constitutional Amendments I, IX, and XIV.

Count II does not allege By-Law violations. Defendant Hospital and Defendant Caucasian physicians faded and refused to treat Plaintiffs patients, (See the verified complaints of twelve (12) patients referred to herein and incorporated herein as "Exhibit B").

Count II is a claim of racial discrimination, and Defendants, and each of them, have violated my civil rights. Civil rights suits am excluded from the immunity clause of the Health Care Quality-Improvement Act of 1986, (LeMasters v. Christ Hosp. (1991, SD Ohio) 791F Supp 188).

Respectfully Submitted

Dated: 5-23-96

/s/_____
James Benjamin, Jr., M.D. Pro Se

MEMO

TO: Administrative Staff, Medical Staff, Medical Staff Office, Directors of Nursing, Central Registration, Emergency Room, Ancillary Services

FROM: David A. Peterson, Executive Director

SUBJECT: MEDICAL STAFF PRIVILEGES - DR. JAMES BENJAMIN, JR.

DATE: 31 Dec 93

By action of the Board of Directors, acting on recommendation of the Medical Staff, active staff privileges of Dr. James Benjamin, Jr. are ended as of 31 Dec 93. Consequently his current inpatients have been reassigned to other physicians and Dr. Benjamin is not permitted to sadmit new patients.

Dr. Benjamin retains privileges ordinarliy extended to any licensed physician who is not a member in any category of the TAMC Medical Staff, and only those privileges. These are described in Directive #50 (copy attached). In order to avoid undue inconvenience to area patients, the prohibit outpatient service orders by Dr. Benjamin. This special exception wil be in force only until Hanuary 31, 1994 (unless sooner recinded) in order that affected patients may make alternative service arrangements.

Should you have any questions concerning the effects of these changes, please contact me, Dr. Hamlin or the Adminsistrator on Call.

DAP/ebl:K1986

Attachment (Directive #50)

DIRECTIVE #50

TO: Ancillary Departments

FROM: Medical Staff

SUBJECT: Authorization for Service or Procedure Provided at TAMC

DATE: 20 Oct 93 (Supersedes 04 Mar 88 Directive)

FILE UNDER: Authorization for Service or Procedure Provided at TAMC

EFFECTIVE: 29 Oct 93

BACKGROUND

The following need has been identified: All requests for servic3es must be supported by a properly authenticated order by a physician on this staff or other physicians or allied health professionals who are entitled to make such requests.

The Medical Staff approved a policy defining who, other than members of our staff, may order services from this hospital.

POLICY

All services or procedures shall be provided on the order of:

a member of the TAMC medical staff;
any physician licensed in the United State and credentialed by a JCAHO approved institution and/or a dependent allied health professional under their supervision;

any physician credentialed by the armed forces; or a TAMC credentialed Allied Health Professional.

It is the responsibility of the department providing the service to obtain proper authentication of the order. In some cases, the service may be provided on the written order of the physician director of the department.

Physicians not on staff who make frequent requests will be supplied with appropriate requisitions.

_____, M.D.
David D. Jones, M.D.
Medical Staff President

_____
David A. Peterson
Chief Executive Officer

February 26, 1996

James Benjamin Jr., MD
171 Academy Street
Presque Isle, ME 04769-3197

RE: Sanctioned UPIN

Dear Dr. Benjamin:

In order to prevent inappropriate Medicare Payments due to the rendering, ordering or referral of services or items by physicians or suppliers sanctioned by the Office of Inspector General, the Region A DMERC (Durable Medica lEquipment Regional Carrier) recently installed claims processing edits to identify such services. Our provider databases are regularly updated with sanction information maintained by the UPIN (Unique Physicain Identification Number) Registry.

As you know, you provider record currently contains data indicating that a sanction exists due to a "program related conviction". Due to this sanction code, a number of beneficiaries and suppliers were informed via letter that no services would be paid (for dates of service greater than 20 days following the date of the letter), when referred by a sanctioned provider.

As you also know, based upon your lack of knowledge of any sanctions against you, this office undertook an investigation to verify the information contained on our database. In querying all potential sources of a program sanction, this office has found no record of any such sanction.

I apologize for any inconvenience caused by this apparent error. I have informed the UPIN Registry of my findings. Services ordered/referred by you will processed in a normal fashion. Please find attached copies of beneficiary and supplier letters informing them of this discrepancy. If you have any questions, please five me a call at (203)639-3171.

Sincerely,

Rebert P. McGinley
DMERC Region A
Fraud and Abuse

cc: UPIN Registry

Motion for Continuance

Time is needed for Counsel to study exhibits delivered by the Hospital, on Monday, November 29th, 1993 at 12:21 P.M.

Time is needed to prepare and present in light of Recent disclosures.

I hereby move to postpone to a reasonable date certain, and for other appropriate relief.

Sincerely

James Benjamin, Jr., M.D.

11-30-93

MEMORANDUM

TO: All concerned parties

FROM: Stephen Wood, M.D.

DATE: 29 Jun 93

SUBJECT: Medical On-Call Coverage

Commencing 7:00 Am>, 05 Jul 93, Dr. James Benjamin and Dr. Stephen Wood will no longer be sharing medical on-call responsibilities. When Dr. Benjamin is the internist on call, please call the TAMC switchboard operator to see who is covering Dr. Wood's patients, and utilize that physician's services. When I am the on-call internist, please do not call me concerning Dr. Benjamin's patients; he will be making his own coverage arrangements.

I am sorry for the burden this places on the switchboard operators, nurses, and clinical staff, but htis system for now will be in the best interest of the patients.

Sincerely,

Stephen Wood, M.D.

SW; jaa:MSW994
pc: Presque Isle Nursing Home
A. R. Gould Switchboard
Internal Medicine physicians
Muriel Davis, RN, DON
David A. Peterson, CEO
Emergency Department

All nursing stations at A. R. Gould Division
Paul Hamlin, Md, Medical Director
MEMO

TO: Nursing Stations Switchboard

FROM: Maryann Walsh, M.D.

SUBJECT: CALL COVERAGE

DATE: 16 Sep 93

The purpose of this memo is a formal notification that as of this date I will no longer be sharing internal medicine call/coverage with James Benjamin, M.D. Individual arrangements will be made.

nsc/K1732

Dr. James Benjamin
171 Academy Street
Presque Isle, Maine 04769

11/9/93

Dear Dr. Benjamin,

I am writing this letter to inform you that I am discontinuing our cross coverage medical call rotation. As of Friday 11/12/93, I request that you not cover my patients; and, as of this date. I will cease covering yours.

Ronald A. Rohe M.D.
BOX 151
Presque Isle, ME 04769

Ronald A. Rohe

CC: Administration
Dr. Paul Hamlin
Medical Staff Office
Nursing Administration
Medical Floor
Surgical Floor
OB-GYN Floor
PCU/ICU
Emergency Room
Drs. Wood/Silber/Walsh

MEMORANDUM

NOVEMBER 10 1993

EFFECTIVE IMMEDIATELY DR. SILBER WILL NO LONGER COVER DR. BENJAMIN'S PATIENTS.

WGS/aal

Administration	Dr. English	Dr. Pelli
Nursing Administration	Dr. Gallagher	Dr. Pendleton
Medical Staff	Dr. Gilman	Dr. Prasanna
Surgical floor	Dr. Hamlin	Dr. Rideout
Medical floor	Dr. Hersey	Dr. Rohe
Obstetrical floor	Dr. Jones	Dr. Rotz
Progressive Care Unit	Dr. Juers	Dr. Shaw
Special Care Unit	Dr. Haeberlin	Dr. Sims
Emergency Room	Dr. Litz	Dr. Somerville
Dr. Alexander	Dr. Martin	Dr. Tewksbury
Dr. Arato	Dr. McBreairty	Dr. D. Tungol
Dr. Beker	Dr. Millhouse	Dr. J. Tungol
Dr. Benjamin	Dr. Morrison	Dr. Watterson
Dr. Bina	Dr. Nicholas	Dr. Walsh
Dr. Cenedella	Dr. O'Brien	Dr. Weber
Dr. Crystal	Dr. O'Neill	Dr. Wood
Dr. Ford	Dr. Paradis	Dr. Wyckoff
Dr. Fowler	Dr. Patriarca	Dr. Young

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMES BENJAMIN, JR., M.D., Plaintiff v. THE AROOSTOOK MEDICAL CENTER, et al. Defendants	RESPONSES OF DEFENDANT THE AROOSTOOK MEDICAL CENTER TO PLAINTIFF'S REQUEST FOR ADMISSIONS

The Defendant, The Aroostook Medical Center, through its counsel, pursuant to F.R.Civ.P. 36, as follows:

1 . The Summary Suspension-Hearing for Dr. Benjamin on November 30, 1993 was held less than thirty (30) days after the date of notice.

RESPONSE: Defendants admit the Summary Suspension Hearing for Dr. Benjamin on November 30, 1993 was held less than 30 days after the November 22, 1993 date of notice of summary suspension.

2. Among other persons, the hearing panel included, David Jones, M.D., Stephen Wood, M.D., Nancy Oneill, M.D., Ronald Robe, M.D., and Mary Ann Kradzinski-Walsh, M.D., all local physicians, who compete economically with Dr. Benjamin for medical patients.

RESPONSE: Assuming Plaintiff is referring to the hearing panel which reviewed the Plaintiffs summary suspension, the Defendants admit that the hearing panel included David Jones, M.D., Stephen Wood, M.D., Nancy O'Neil, M.D., Ronald Robe,

M.D. and Mary Ann Kradzinski-Walsh, M.D., all local physicians. The Defendants deny the remaining requested admission.

3. At the November 30, 1993, hearing, Dr. Benjamin was denied the right to representation by an attorney.

RESPONSE: Defendants deny the requested admission contained within Paragraph 3.

4. On November 18, 1993, you wrote the Maine State Board of Registration in Medicine, stating that Dr. Benjamin had been "summarily suspended because of a failure on the part of Dr. Benjamin to arrange adequate coverage of his patients in our facility at a time when he was unavailable.

RESPONSE: The Defendants admit that on November 18, 1993 The Aroostook Medical Center wrote the Maine Board of Licensure in Medicine, stating that Dr. Benjamin had been summarily suspended "because of a failure on the part of Dr. Benjamin to arrange adequate coverage of his patients in our facility at a time when he was unavailable.n

5. TAMC has a certain report, Attachment 64, proceedings against Dr. Benjamin, entitled "Conversation Between Murial Davis, R.N., and Theresa Case, R.N., Regarding the Morning of 08 November 1993.

RESPONSE: The Defendants admit that The Aroostook Medical Center possesses a document entitled "Conversation Between Muriel Davis, RN., and Theresa Case, R.N., Regarding the Morning of 08 November 1993." The Defendants deny the remaining requested admission.

6. The nursing report referred to in inqujlNo. Five (5) reveals a statement that Ms. Case, R.N., saw "... and talked to Dr.

Benjamin ... on the PCU Unit" (Progressive Care Unit), on the morning of November 8, 1993.

RESPONSE: The Defendants neither admit nor deny this request for admission as the document speaks for itself.

7. Your November is, 1993, letter to the Maine State Medical Board stating that Dr. Benjamin was unavailable to your facility is an untrue statement.

RESPONSE: The Defendants deny the requested admission: contained within Paragraph 7.

8. Concerning Dr. Benjamin's clinical performance you are not aware afany medical malpractice tort case brought in any State or Federal Court.

RESPONSE: The Defendants are without knowledge or information sufficient to form a basis for the admission or denial of Request #8.

9. On January 4, 1994, you filed with the National Data Bank on behalf of TAMC, an "Adverse Action Report" alleging that Dr. Benjamin was guilty of clinical incompetence, malpractice and negligence. "

RESPONSE: The Defendants deny the requested admission contained within Paragraph #9.

10. When you filed the Adverse Action Report referred to in inquiry No. Nine (9) you knew Dr Benjamin was not guilty of malpractice.

RESPONSE: Denied.

11. You are aware of written claims or demands for payment based on Dr. Benjamin' s furnishing or failure to furnish health care services to patients.

RESPONSE: The wording of Request for Admission #11 is somewhat vague and the Defendants assert that they are unclear as to what "written claims or demands for payment" that the Plaintiff is referring to in his Request for Admissions and therefore deny the same.

12. In your role as Executive Director for TAMC, you failed to give Dr. Benjamin timely notice ofthe time, place and date certain of a corrective-action hearing concenzing your October 11, 1993, letter to Dr. Benjamin.

RESPONSE: The Defendants deny the requested admission contained in Paragraph 12.

13. At the Summary-Suspension hearing referred to in Inquiry No. One (1), you received copies of "Physician Order Sheets" concerning certain Telephone Orders for Patients Nos. 14-78-37, 16-05-32, and 14-64-97.

RESPONSE: The Defendants admit that at the summary suspension hearing referred to in Inquiry No. One The Aroostook Medical Center received copies of "Physician Order Sheets" concerning telephone orders for Patients Nos. 14-78-37 and 14-64-97, but deny the remaining Request for Admissions contained within Paragraph 13. referred to in inquiry No Nine

14. You participated in an Ad Hoc Committee Meeting concerning Dr. Benjamin on July 29, 1993, wherein you commented that, a report by "... The chairman..." of an external review board, stated that Dr. Benjamin's performance was not indicative of a board certified intemist, ..." but the report does not so state.

RESPONSE: Assuming the "you" contained within Request for Admission #14 refers to David Peterson, CEO of The

Aroostook Medical Center, the Defendants respond as follows. The Defendants admit that David Peterson participated in an ad hoc committee meeting concerning Dr. Benjamin on July 29, 1993 and that the minutes of that meeting documented "comment" presumably made by CEO Peterson. However, the Defendants deny that the documented statemeut was the

exact wording of David Peterson versus a general summary of his statement. Furthermore, the report generated by the external review members reads that the care provided by Dr. Benjamin was marginal, and in some cases substandard.

15. In inquiry No. Fourteen (14), you knew the external review chairman did not make such statement.

RESPONSE: Denied.

16. You further cdntended that the External Review Report described Dr. Benjamin's clinical performance as a "... case merited review," or the reviewers "... saw unacceptable care," however, the report does not contain such language.

RESPONSE: Assuming the "you" referred to in Request for Admission #16 refers to David Peterson, CEO of The Aroostook Medical Center, the Defendants deny the same.

17. On or about December 30, 1993, Dr. Benjamin's letter of resignation to TAMC, stated among other things, that there was "A work-test period of six (6) months for Caucasian physicians and a (2) month work-test period... "him"

RESPONSE: Denied.

18. Your memo of December 3 i, 1993, stated among other things that Dr. Benjamin's patients had been reassigned to other physicians, that Dr. Benjamin had lost his staff privileges, and

that unless his patients transferred to new doctors, they Gould not be treated at TAMC.

RESPONSE: Defendants deny the requested admission contained within Paragraph 18 and further assert that the document speaks for itself.

19. You are aware of incompetent and negligent clinical practice and performance by Dr. Benjamin.

RESPONSE: The Defendants admit The AroostookMedical Center is aware of "marginal and substandard care by Dr. Benjamin by virtue of, among other things, the external peer review report."

20. You are aware of an External Peer Review Report concerning Dr. Benjamin wherein the reviewers state that Dr. Benjamin's "clinical performance" was "substandard."

RESPONSE: The Defendants admit that The Aroostook Medical Center filed an Adverse Action Report which indicated that Dr. Benjamin's privileges were not reviewed based on 1) substandard clinical performance; 2) delayed or lack of availability to staff; 3) disruptive behavior; 4) avoiding peer review process and trying to intimidate those engaged in peer review through threatening communications to physicians and staff.

21. Your January 4, 1994, report to the National Practitioner Data Bank, stated among other things that Dr. Benjamin exhibited:

1) Substandard clinical performance;
2) Delayed or lack of availability to staff,
3) Disruptive behavior;
4) Avoiding peer review through threatenipg communications to physicians and staff;

5) Problematic professional conduct; marginal clinical competence;
6) Unwillingness to address these issues.

RESPONSE: The finding of problematic professional conduct, marginal clinical competence and an unwillingness to address these issues led to the conclusion that Dr. Benjamin not be offered privileges at TAMC.

22. TAMC renders medical services and related health services to patients within the State ofMaine.

RESPONSE: Admitted.

23. On or about November 9, 1993, TAMC reassigned three (3) of Dr. Benjamin's hospital patients to other physicians.

RESPONSE: Admitted.

24. According to TAMC's Corporation Charter, the hospital agrees to extend health services;to ill and disabled persons "... without regard for race, color, creed national origin or ability to pay."

RESPONSE: Admitted,

25. TAMC failed and refused to provide medical services to certain patients because Dr. Benjamin was the primary care-physician for said patients.

RESPONSE: Denied.

26. TAMC disseminates health care information to the general public, regarding both services and use of medication.

RESPONSE: Admitted.

27. TAMC failed and refused to assign Dr. Benjamin to the list of physicians who performed routine EKG readings, (electrocardiogram).

RESPONSE: Admitted.

28. TAMC failed and refused to produce to Cary Medical Center "all medical records and charts used by" TAMC "... in denying andjustifying its failure to grant.." Dr. Benjamin... "111 and complete medical staffprivileges."

RESPONSE: Admitted.

29. Dr. Benjamin lost "a substantial number of his "office-based patients"
"because" he "was unable to treat patients" at TAMC.

RESPONSE: The Defendants are without knowledge or information sufficient to either admit or deny the Request for Admissions contained withiri Paragraph 29.

30. When four physicians wrote memos stating that they would not cover Dr. Benjamin's patients, TAMC Hospital did not require the said physicians to cover Dr. Benjamin's patients. (For identification the physicians were and are, Dr. Wood, Dr. Walsh, Dr. Silber, and Dr. Robe defendants herein.)

RESPONSE: Admitted.

DATED at Portland, Maine this 29th day of February, 1996.

Penny St. LouiS, Esq.
Attorney for Defendant The Aroostook Medical Center
PRETI, FLAHERTY, BELIVEAU & PACHIOS a Limited Liability Company
443 Congress Street, P.O. Box 11410 Portland, ME 04104-7410

STATE OF MAINE
AROOSTOOK, ss.

SUPERIOR COURT
CIVIL ACTION
CV-93-296

JAMES BENJAMIN, JR., M.D., et. al.,

Plaintiffs

vs.

THE AROOSTOOK MEDICAL CENTER, et. al.,

Defendants

AFFIDAVIT OF TERESA CASE

That she is eighteen (18) years of age or over;

That she understands the nature of an oath;

That she is a nurse, employed in a professional role of administering 'and providing medical assistance to the sick and afflicted;

That from May, 1992 to January, 1994, I was employed as a nurse at The Aroostook Medical Center (TAMC);

That it was common knowledge among the nurses at The Aroostook Medical Center that there was a move to drive Doctor James Benjamin away from the Hospital;

Since on or about March, 1993, the supervisors told the staff on Progressive Care Unit and other floors to chart in the nurses notes every time:

(1) That Dr. Benjamin was paged, and, how many times for the same problem,

(2) How long it took him to answer the page,

(3) If they had to dial him personally because, for whatever reason, he did not answer the page;

(4) To record everytime they called Dr. Benjamin and his mother, father, or brother answered the phone.

The nurses were ordered to note everytime Dr. Benjamin came into the Hospital:

(1) Who he saw;

(2) What time it was,

(3) How long he stayed,

(4) Note whether his patient was sleeping and whether he awakened the patient, they even asked the patients if they were sleeping; and, inquired of the patients what the Physician told them.

Nursing supervisors were very vigilant to remind staff frequently to write down and report to them and Gary Michaud everything Dr. Benjamin did or did not do; and

The nurses were not told to harass other doctors like this.

The Administration told the nurses that news publicity opened up a "who le can of worms," that the Administration wanted to "keep the nurses out of it, but some would be asked to testify in court."

During April, the nursing staff began to protest the spy game. On April 27, 1993, Oary Michaud, R.N. wrote to Muriel Davis, R.N., the Director of Nursing at The Aroostook Medical Center, words to the effect, that, this continues to be a daily occurrence that we must spend hours chasing Dr. Benjamin. The supervisors and charge nurses do not have time to play games. This constant watch of Dr. Benjamin is starting to affect patient care. It cuts into supervisors goals and objectives for patient care. it has been

more than a month since we have been documenting stuff on Dr. Benjamin. We repeat the same things day after day.

That the foregoing statement is true of my own knowledge, except such statements attributed to others, and I reasonably believe such information to be true.

Dated: June 12, 1994 /s/_____
Teresa Case, R.N.

Subcribed and sworn to before me this 12th day of June 1994, Linda LeBlanc, Notary Public

Dated: June 12, 1994 (seal) _____
Linda LeBlanc
Notary Public

STATE OF MAINE
AROOSTOOK, ss.

SUPERIOR COURT
CIVIL ACTION
CV-93-296

JAMES BENJAMIN, JR., M.D. et al.,

Plaintiffs

vs.

THE AROOSTOOK MEDICAL CENTER, et al.,

Defendants

AFFIDAVIT OF

BERNICE BEALS

AFFIDAVIT

I am a patient of Dr. James Benjamin, Jr. I have received very bad treatment from the Aroostook Medical Center because I was a patient of Dr. Benjamin's . On or about November 30, 1993 at 1:10 PM, I was given some tests to be run and I proceeded to The Aroostook Medical Center to have the tests done. I was treated in a rude, outrageous manner, by the women at the Emergency Room desk and in the vicinty. Then Mr. Peterson, the Hospital Executive Director, himself came down and told me to get out of there. He told me I could not have the tests done there, that Dr. Benjamin was just using me, and the Dr. Benjamin had put me up to coming htere. Dr. Benjamin did not put me up to going there. I went there because my doctor gave me orders to have tests done. That was a hospital I have gone to all of my life. I saw no reason to go anywhere else to get thes tests done. But, Mr. Peterson told me that I could not have the test done because I was a petient of Dr. Benjamin's. I had to leave without the tests being done. I left in absolute tears. I went

back to Dr. Benjamin's office and discussed it with him for awhile, how to get the tests done, and I could not control my crying until after I had spoken to Dr. Benjamin for awhile. I then went to Cary Medical Center at 2:28 PM and got the tests done. I believe for certainty, that Dr. Benjamin is being treated this way because he is a Black physician. We all love him and do not want to go to anyone else except him.

DATED: June 13, 1994

_____
Bernice Beals

Subscribed and sworn to before me this 13th day of June, 1994, /s/_____, Notary Public.

Dated: June 13, 1994 (seal) /s/_____
Linda LeBlanc
Notary Public

STATE OF MAINE
AROOSTOOK, ss.

SUPERIOR COURT
CIVIL ACTION
CV-93-296

JAMES BENJAMIN, JR., M.D. et al.,

Plaintiffs

vs.

THE AROOSTOOK MEDICAL CENTER, et al.,

Defendants

AFFIDAVIT OF

CELIA CHAMBERS

AFFIDAVIT

I, Celia Chambers, being first duly sworn deposes and says:

I am 18 years of age or over;

I understand the nature of an oath;

I went to the hospital with my son, Raymon, because he had cut his head. When I arrived there, the nurse called Dr. Benjamin and he came to see him on or about August 28, 1993. There were no rooms open. The nurse said that she would call Dr. Benjamin as soon as one was open. When the room opened, we went in and the nurse said that she would call Dr. Benjamin. She was in my view, but I did not see her call Dr. Benjamin. Then she came into the room and said, "Oh I forgot to call him." But told me that she had already called Dr. Benjamin an hour ago. She went and called again. I heard her call Dr. Benjamin. Dr. Benjamin came in in about five minutes. Then when he went to find the needles and things to fix Raymon's head, the nurse said, "Up there." And she would not help Dr. Benjamin. Se

when he tried to stitch Raymon's head, he needed help. I said, as I leaned over sideways, "Do you need help?" Dr. Benjamin said, "Yes, please." So I helped him. My son needed to be cleaned before he went home. So Dr. Benjamin went to find the things to clean him, and he asked for help again to find some things to clean his head. But they [nurses] just sat there and they talked to each other. There was another nurse sitting with her and they were talking. Dr. Benjamin started to look for something to clean Raymon's head with and a nurse that had just come on duty, on her shift asked him if she could help. Dr. Benjamin said yes, he needed to find something to clean his patient's head with. She told Dr. Benjamin where to find the items he needed, but did not offer to do this herself. She watched him clean Raymon's head. Dr. Benjamin told my son to get into the shower and clean the wound better when he arrived home.

I did call the hospital, but Steven Poitras, from Administration, was out of the office or busy, so I never got hold of him. I called him about five or more times.

Dated: June 11, 1994

_____
Celia Chambers

Subscribed t oand sworn to before me, Linda LeBlanc, Notary Public, this 11th day June, 1994

(seal)/s/_____
Linda LeBlanc
Notary Public

STATE OF MAINE
AROOSTOOK, ss.

SUPERIOR COURT
CIVIL ACTION
CV 93-296

JAMES BENJAMIN,
JR. M.D. et. al.,

Plaintiffs

AFFIDAVIT OF

vs.

GEORGIE DAVENPORT

THE AROOSTOOK
MEDICAL CENTER,
et. aL.,

Defendants

AFFIDAVIT

I am a patient of Dr. Benjamin's. I have many things wrong with me, and I need to be hospitalizedoften. But, because I am a patient of Dr . Benj ami n ' s , I get very badly treated I have had a hospitalization after Dr. Benjamin was The Aroostook not on Medical Center. I went to The Aroostook Medical Center Dr Hamlin came in and said very rude things to me; told me he was sick of the sight of me, and he wanted me out.of there because I was a patient of Dr. Benjamin's. Dr. Silber came-to my rescue, took me in as a patient and treated me for the time I was there. I was treated very well by Dr. Silber. I have great confidence in Dr. Benjamin, and I am afraid of being treated by anyone else. I am afraid because I am Dr. Be nj am i n ' s patient and will not change over and become Dr. Silber's patient, that I

would be badly treated if I have to return to The Aroostook';Medical Center, which is very likely, due to my many and different physical conditions.

Dated: June 13, 1994 /s/_____
Georgie Davenport

Subscribed and sworn to before me this day of of June Linda LeBlanc , Notary Public.

I Dated: June 13, 1993 (seal)
LeBlanc

Linda LeBlane Notary Public NOTARY PUBLIC, MAINE

STATE OF MAINE
AROOSTOOK

SUPERIOR COURT
CIVIL ACTION
CV-93-296

DR JAMES BENAJMIN JR., M.D.
et. al.,

Plaintiffs

VS.

THE AROOSTOOK MEDICAL
CENTER, et. al.,

Defendants.

AFFIDAYIT OF

JOAN. TWEEDIE

AFFIDAVIT

I believe Dr. Benjamin is being discriminated against because. I was refused services as a result of being a patient of Dr. Benjamin's. This necessitated my having to travel to Bangor (300 miles round trip) and also necessitated an overnight stay because the test was actually a two-part test, of my thyroid. It was not possible to get test Performed in Caribou.

DATED: June 13, 1994

_____
Joan Tweedie

Subscribed and sworn to before me this 13th day of June 1994, /s/_____, Notary Public

SUMMARY OF OF EVENTS CONCERNING OR JAMES BENJAMIN'S SUMMARY SUSPENSION

asked to

By: David Jones, MD. Medical Staff President

Dictated at 1035 hours on 1Z Nov 93 On the 1Dth or Navembe, at Medical Dependant Or Valsh,braught up a concern Lhat O, Benjamin ,pafientr Department poriibly been abandoned. There was no clear understanding .t that time whether Dr. Benjamin Benjamin had set up coverage for "'i patienli ,, absence abience not. I thaught that Dr. Benjamin was Has in California since the Previous Friday (05 Nov 93). internists stated stated they had not been asked to t, cover. Present as all of the were: Or. Wood, Dr. Walsh and Dr Rohe. At that point all of the physians stated "O as internists coverage had been requested. Nursing had brought this to the attentfon of Dr. Walsh due to to their lity to have Patients attended to by O, Benjamin and that some of the the patients "ere havin acute medical problems. concern for an inabi Benjamin's Patients in his absence and requested v0lunteers f,c~P,e Of Dr. Benjamin requested three volunteers to assume assess whether this was per·-lved as actoal abandonment or not. D~pmmlttee to Rohe, Dr. Nursing S,pepvisor, b, Present from NUrsing to Present the Nursing data.

Folioxlng the, Medical Department.eetlng, the three physicians who agreed t, dslume care foP Dr. Benjamin's patients Sav their assigned Patient and assumed care of the Patient and notified ~amriy members .f each of the Patients of the change io attending ,t~tlr~ It ir the arsumpt(,, Of these three physicians that fhey yill contrnue t, ~,~~ for there P,tientr until told otherwise by Dr. Walsh, Chairperso" of the Medical Department. the Board Roa., along with Jo~ce Illen. Medical Staff Secpetary, ,5 ,cPibe. The Bylaws, Rules & on in Nov 93 InSulations of the Medical Staff of The Aroostook Medical Center were reviewed. Following a prolonged discussion for there was a consensus that of the three

Inpatients of Dr. Benjamin' acute and two were awaiting "u'sing home placement and all three ha~ one was approximately 50 minutes, been At that Point Dr. Waish joner and Or Aiexand,; volunteered to be this review committee Muriel Davis, RN, Dlre,to, of Nursing, Recommended that Gary Michaud RN Senior

The committee to abandoned. Even more troubling to US was that once Or. Benjamin was aware that one of the Patients .,, not doing ,, Hell, aS apparently he had called i, once Or tvice, he still did not requezt care from another physician. At no point during his absence f,,, the 6th through the IOth of November had he requested a"other physician t, assome 0"9oing care of his Patient. Alexander~ Dr. Rohe, and I all felt that this At this Point I, as Prerldent.f the Medi Cal Staff ,f The Aroostook Medical constituted abandonment. Center, made the decision t, summarily Iuspend Dr. Benjamin. But, as vested tn me by the Medlcai Staff Bylaws,..uld allow Dr. Benjamin to continue t, have access to medical records and have access to outpatient allow him to act as an attending In any roie "whatsoever services but would not then met with Jack Ginty for an extended period in his otfice, discussing these Issues. I drafted a letter cJted November 'i). 1993, summarily suspending Dr. Benjamin. Please See this letter for turther details. Unknown to me dtthiS time, Dr. Benjamin returned Aroostook Medical a and wa actually on the floor wr tin orders on patients that he no longer had privileges to attend. At this poipt he did not know that he had lost his privileges. I had a conference call with Dr. Wood, explaining the situation to him, as he is Vice-president at the Medical Staff. Mr. Ginty was present for this conversation. I ,150 attempted to make a call tO Dr. Walsh but was unable to reach her. I then had a conference call with Gordon Smith, medical staff attorney, and explained to him our decision process, my action as medical staff president, and read the letter to him. He agreed with the content of the letter. At this point I returned home for the evening. On the morning of November Il, 1993, I arrived at the hospital at approximately 7:45 in the morning. At

that time Gary Michaud, RN, spoke to me In the hall, stating that Or. Benjamin was upstairs seeing patients, although he had been specifically notified by Mr. Ginty the previous evening that he no longer had attending privileges.

At this point I searched both Joyce Alien's and Jack Ginty's offices for the letters, not knowing that Mr. Glnty already had them and had tried to present the letter to Dr. Benjamin. Failing to find the letters, I chose to go upstairs to Medical Unit and speak to Dr. Benjamin Hithaut the letter in hand. I arrived on the floor to find Dr. Benjamin just getting up from the Medical Station and asked him if he would like to talk with me for a few minutes. He said "No" and turned his back on me and started walking toward the stairwell at the Medical Floor. I walked behind him stating that I thought ne really needed to talk. He walked through the door and I pushed the door open, following him, stating that we could talk on the stairwell. He continued to walk, went down one flight of stairs, turned a corner on the landing so that we were facing each other and I requested again that He talk. I had stated at this point that I had summarily suspended him the night before. At thh point he looked up at me and said, "Goodbye, David, " and kept .walking. I saw no point in chasing him further down the stairs, requesting a conversation, as obviously he had no interest in talking with me. At this point I was paged by Mr. Ginty and returned to his office where He had a long discussion concerning Mr. Gintyls activities with Dr. Benjamin the night before. Apparently M' Ginty had spent quite a few hours in the hospital trying to present the letter to Dr. Benjamin, which he refused to accept. Mr. Ginty fully notified Or. Benjamin, to his face, multiple times that he had been summarily suspended; and Dr. Benjamin refused to acknowledge this, stating that he wanted to be formally notified by registered mail.

At this point one of the medical records personnel let us know that Dr. Benjamin was trrdoing medical records; and Mr. Ginty and I, at approximately 8:25 A. M. sat down in Medical Records,

across from Dr. Benjamin, and had a 25 minute converration concerning his summary suspension. Mr. Ginty reviewed three or fourMmes the fact that he had been suspended, that he had no inpatient clinical privileges and that he had no legal right to either write orders, write
progress notes, or act as an attending around his patients. Dr. Benjamin continueb to reiterate the fact that he had not been notified by any formal mechanism. He then stated that the Bylaws were very specific, that before this correct. he nad to "e notified Cy registered „ii. At this point I went got our Bylaws, Rules & "'aura regulations ana ooenea ;nowea this to Dr Benjamin i., to Summary Suspension and VII and Article VIII. and he read the pertinent own admission what he was reading but then srateo that tneir nas no Identification of notification Process and. therefore, :, insisted on being notified formally. I told him "hether he chose to be notified formally or not, 't did not nullify his summer suspension that took effect immediately upon my decision to Impose It the previous night (November 10) at 7:55 P. M. He again refused to acknowledge 'eaa the pertinent paragraphs in both Article this, Stating that he had not been formally notified. Ot seeking to have this be an adversarial process; that I had chosen, in fairness, to allow him to have access to medical records and to outpatient services, but if he persisted 1, pursuing a confrontational course, insisting (formal notification and continuing to act as an attending within the hospital Setting, that I would have to remove both his Outpatient and Inpatient clinical services and deny him access to medical records. i also reviewed the possibility of having to have him removed from the Institution by the police, i he refused t, comply nith the terms of his suspension. Mr. Ginty then reiterated the Issues of his suspension and the Possibility of him being physically removed by the police if he did not comply; and i, also, reiterated my comments at least two more times. At the end of the interview both Mr Ginty and i Felt that we had repetitively informed Dr. Benjamin of his suspension, and the,possible Summary suspension, the details of the sunrmary

ramifications of him ignoring this. We also agreed to send this registered mail, but felt this In "O way lessened the imposition of his suspension the Previous night.

This morning, before coming to The Aroostook Medical Center, Mr. Glnty called me and stated that Dr. Benjamin was once again making rounds on Medical Floor. We both agreed to try and meet with him him on our arrival at the hospital. On my just entering his office, having stated that he had called the Medical Floor and spoke to Dr. Benjamin. Dr. Benjamin had asked him specifically what he, Mr. Ginty, was „5 going to do if Dr. Benjamin did not quit making rov"ds. Mr. Ginty told him that- he would decide on that process once he had arrived. Mr. Ginty had strongly urged Dr. Benjamin to cease acting as- an

After my conversation with Mr. Ginty, I felt Dr. Benjamin had violated the terms Of his summary suspension, was apparently going to ignore all and any face-to-face communication and, therefore, it was incumbent on me to prevent any further disruption to TAMC's P,i,,,y mission, which is the care of patients, and had to deny nr Benjamin access to the facility. At that point, which I believe Was 8:55 A.M. I I wrote a letter informing Dr. Benjamin that, as Medical Staff President, I had removed all outpatient and Inpatient clinical privileges from him and had also chosen to deny him access to the Medical Center itself. I expressed in the letter my disaPPointment and frustration at having to proceed this Hay and, also, stated that I hoped that we could try and, both informally and formally, continue to worl; on this Issue nhi ch must be so difficult for Dr.

I then paged Dr. Benjamin to call me at Mr. Gintyls office and did not receive any return call for approximately 15 minutes. At that time Mrs. Benjamin, Dr. Benjaminls mothe returned the call. I had roughly a 10 minute conversation Wood and Mr. Ginty on speaker phone. She was informed of their presence. I explained that he I then stated that I wa

arriva.i Mr. Ginty was attending. Benjamin. Present O, Benjamin Hith the letter face-to-face, and his refusal to take the talked to about Iryi(ng to physically letter She stated that In law face-to-face Presentation ""S "Ot adequate, that the letter had to be hand delivered At that point i told her that face-to-face with the Medical Staff President i, hand del 'Very and Is as direct and formal as a delivery process ,,, be. She stated that she disagreed with this and that the only notification that they would accept she valid would be registered mail. I told her that she could continue to Perceive this as the only appropriate method Of notification, but that In point of fact and according to the Bylaws, these issues became effective immediately upon my announcing them. I told her that I "Oula gladly Send both the letter from the IOth and the letter from today by registered mail to her, but this was as a the imposition of full suspeosion. During this conversation she stated that she courtesy and changed nothing as far as acknowledged her soots summary suspension this the IOth, but wanted to see it Informal writing by , registered letter. I repeated what she had just told me, rating that I welcomed her acknowledgement and acceptance of her son's summary registered letter and She did not contradict he had been summarily suspended., the IOth. The rest of the phone conversation Strongly that they did all accept the fact that Was essentially a repeat of what had Previously ,ccurred. Duplicate originals of both both my letter from the with and this morning's letter Here made. They were sent by certified mail to his home address, by certified mail to his office and then He had TESCO have once again by a separate Poute, a courier, tried to present Dr. Benjamin with his formal notification, which he he has refused accept. Dr. Wood Vice-president he needs to essentlally fulfill my going on vacation today, d"d Will proceed with an suspension and Would proceed with a which he refused t, accept, stating that rt had to be by registered mail;person, Present both letters to him In so obligations In this as I am letters My general impression through this whole process Process is that Dr. Benjamin fully Understands that he has been sununarily Suspended, but through Some misguided. misinterpretation

of;the Bylaws, Rules a"d Regulations or by poor advice, Perceives that somehow he is is legally protected to c0"tinue doing what he does U"til he has a registered letter i, his hand. He has certainly heard both from myself and from Mr. Glnty, that it does not matter whether he has a registered letter or not, that this action is Immediate upon my declaring it so. I found it.,tremeiy u"usual that, as Medical Staff President, I had to his mother today concerning these issues, and not the physician Staff is-sues concerning an attending with the attending's mother. I have heard Issues, discipl'"ary issues, ,, any other medical from multiple People who have dealt vith Dr Benjamin over the last Year that is essentially his representative, but found it both amazing and extremely awkward to have her be 'he spolrerman for Or Benjamin this maming. When I know that he Is i, the area and had in in fact been in the hospital just an communicate with his mother point this process had become discussed so disruptive that had to tn institute these this process She reiterated multiple times the fact that :hey did not feel that this process had they had "Ot been formally

James Benjamin, Jr., M.D. 171 Academy St. Presque Isle, ME 04769

Dear Dr. Benjamin, November 13 1995

As you know, we recently forwarded to you copies of all the correspondence we could find between you and us concerning your medical staff application. Enclosed, you will find all of the correspondence between Oary and TAMC concerning your application which we could find, with the exception of Dr. Jones' letter which is referred to in the enclosed correspondence. Also enclosed is a copy of your actual application.

We have not copied material which you sent to us. Similarly, we have not copied the confirmation of your medical school graduation, your residency, your license, nor your DEA

registration, as any third party would want direct confirmation from the applicable school hospital or governmental agency.

Finally, we have not included copies of reference letters. The functioning and integn'ty of the credentialing process depends upon the receipt of frank comments from references. DisClosure of reference letters clearly would have a negative impact on the reference process in that it would tend to make those giving references less candid. I hasten to add, as was expressed in the minutes of the Department of Medicine Meeting of February 17, 1994, and in Dr. Nadeau's February 18 memo to Dr. Michaud, copies of both of which are enclosed, that in your case, it was not the references which caused Oary to want to further scrutinize your credentials, but rather, the jvlowledge that TAMC had taken adverse action against you based upon chart review. (Of course, it was the lack of access by Oary to those charts for the purposes of re-review that stymied completion of evaluation of your application.)

I hope that the enclosed information is of help to you.

JJM/pm JJM/BENJ11IJ.DOC
Sincerely,

John Rmack

Arthur E, Ellis, Director

Office ofHealth Services (517) 335.-0918

November 15, 1995
Exhibit "S"

James Benjamin, Jr. 1407 Wisteria Drive Ann Arbor, MI 48104

Dear Dr. Benjamin:

`The Michigan Board of Medicine hereby informs you that you:do not meet the statutory requirements td,ap'ply'fo; a license to practice medicine in at this time;

Section !6!74(2Xa) ofthe Michigan Public Health Code (copy eneiosed) provides in pertinent part that an applicant for licensure must:

"Establish that disciplinary proceedings before a Simaar licensure, registration, or specialty certification board of this or anyother State or country are not pending against the applicant."

The Maine Board of licensure in Medicine has forwarded information to this office indicating that a Board complaint has been issued against your Maine license and remains pending at this time.

You will not again be eligible to apply for Michigan medical license consideration until such timeas pending proceedings or sanctions are no longer in force on your license in Maine or any other state.

Sincerely,

V Doris C. Foley

Licensing Administrator

November 18, 1993

THE AROOSTOOK MEDICAL CENTER

ARTHUR R. GOULD MEMORIAL HOSPITAL DIVISION

Mr. David Hedrick, Executive Director
Maine State Board of Registration in Medicine
State House, Station 137

BOARD OF REGISTRATION Augusta, ME 04333

IN MEDICINE

James Benjamin, Jr.,.M.D.

Dear Mr. Hedrick:

Pursuant to the provisions of 24 M.R.S.A., Section 2506, please be advised that on November 10, 1993, The Aroostook Medical Center summarily suspended the provisional medical staff membership of James Benjamin, Jr., M.D.

The suspension took place because of a failure on the part of Dr. Benjamin to arrange adequate coverage of his patients in our facility at,ar time Whenhe was unavailable.

Any questions that you have regardina
myself or our medical staff attorney, Gordon Smith, Association.

Sincerely yours, Since

ly yours

David A. Peterson 1, Executive Director
the suspension may be directed to at the Maine` Medical

OAP/jaa:MSW1344

Attachment 75CA

CONVERSATION BETWEEN MURIEL DAVIS RN AND TERESA REGARDING THE MORNING OF 08 NOVEMBER, 1993 CASE, RN;

Ms. Case was approached by myself, Muriel Davis, at 0650 on 10 Dec 93 and was asked to see me in my office after she had given report to Mrs. Besaw on the Pediatric Unit.

Ms. Case came to my office at about 0710 and the conversation was as follows:

Mrs. Davis, "May I ask you some questions related to THE morning of 08 Nov 93."

Ms. Case, "No".

Mrs. Davis, "Not even if they could be answered by Yes or No" .

Ms. Case, "It would depend on the questions"

Mrs. Davis, "Did you see and talk to Dr. Benjamin on or off the PCU Unit".

Ms. Case, "On the Unit".
Mrs. Davis, "Did anyone see you talking to Dr. Benjamin" Ms. Case, "No."
Mrs. Davis, "Did you tell anyone that you had spoken to Dr. Benjamin."

Ms. Case, "No." Then Ms. Case stated that she and Dr. Benjamin had been seeing each other since September and that they had

been quiet about their relationship and she was sure that no one had seen them talking together.

Mrs. Davis, "Can you tell me what some time relates to; five, ten, fifteen minutes or one half hour."

Ms. Case. "No, I don't remember, but it was after midnight."

Mrs. Davis, "Did you see where Dr Benjamin went when he left the PCU Unit."

Ms. Case, "No."

As our conversation continued I am not sure of exact statements. I told Ms Case that I had not questioned any of her co-workers but that I would be asking them if they had observed the conversation between herself and Dr. Benjamin. Ms. Case stated that she thought that she had worked with Kate Shepard on that night. I told Ms. Case that personal relationships between a doctor and a nurse was not of concern

to me, but activities that occurred during her working hours was of concern to me and the hospital.

Other comments made by Ms. Case were that she felt that Dr. Benjamin was not being treated fairly and that other doctors did things much worse than he had done and the nurses were not writing down everything that the others doctors were saying and doing. She said that she knew that the nurses had been instructed to do this in Dr. Benjamin's case. I told Ms. Case that those were not my instructions, but issues related to physician actions were reported to me and that Dr. Benjamin was not the only physician that had been written up by a nurse. I told Ms.Case that when asked I had reported that I felt that she was a good nurse and that I had no reason to believe that she would lie, and that if she said that she had seen and talked to Dr. Benjamin then it was true. I stated that I didn't believe a nurse would lie about any issue

because they would be afraid of losing their license. Ms. Case stated that she had not make any errors or done anything that she knew of that needed a variance report.

Our conversation lasted about twenty minutes, and I told Ms. Case that I would have to give a report on our conversation

December 31, 1992

Bruce Alexander, M.D., Chairperson TAMC Credentials Committee
P. O. Box 151
Presque Isle, ME 04769
Re: James Benjamin, M.D. - Proctoring Review Dear Dr. Alexander:
Dr. Benjamin is currently in his provisional period of medical staff credentialing. He has been assigned a proctor, Dr. Ronaid Rohe, who has done a number of reviews of Dr. Benjamin's charts and records. While it is customary to refer these reviews to credentialing at +he end of the provisional period, I believe there are adequate concerns to suggest an earlier review of these particular records. Additionally, Dr. David Jones has submitted to me a single record from the Emergency Room, with which he had some concerns regarding the quality of care of a patient seen in the Emergency Room by Dr. Benjamin. Specifically, I submit for your review, consideration, and action the reviews of Dr. Rohe on Charts #21-39-29, #21-41-75, #21-39-51, #17-72-54, #20-84-11. P12-21-07, and #13-93-96. Attached are Dr. Rohe's reviews, as proctor, of these particular patients' records. Please also review the correspondence dated December 21, 1992 from Dr. Jones and the supporting materials from the Emergency Room visit with which he had concerns.

Thank you. Sincerely,
/L3·D·

Robert Shaw, M.D.
Chairperson, Medical Department
RS/jaa:MSW600 Attachments
pc. Arleme Cenedella, MD, Credentials Committee Chairperson-elect Ronald A. Rohe, MD, Proctor

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMES BENJAMIN, JR., M.D., (CV-95-0253-B)

Plaintiff

THE AROOSTOOK MEDICAL CENTER, et al.

Defendants ANSWERS TO INTERROGATORIES

1. State the full name and address of the Defendant answering these questions (ifa corporation); the full name, address, employer, title and position of the individual signing the answers; and

The full name, address or last known address, employer, title and position, who was consulted, or who assisted in the preparation of the answers to these interrogatories.

Answer: David A. Peterson. Business address: The Aroostook Medical Center, P.O. Box 151, Presque Isle, ME 04769. Employed by The Aroostook Medical Center and TAMC, Inc. in the position ofPresident.

Technical assistance in preparing the responses to these questions was provided by Attorney Christopher Nyhan of Preti, Flaherty, Beliveau & Pachios, 443 Congress Street, Portland, Maine. Mr. Nyhan represents the Medical Center and its insurance carrier in this case.

Vivian Williams. Business address: The Aroostook Medical Center, P.O. Box 151, Presque Isle, ME 04769. Employed by The Aroostook Medical Center in the position of Credentials Coordinator, assisted in the preparation to certain of these answers.

2. state the full names, address, employer, title, position and Social Security number and position of each person who witnessed or claims to have witnessed the events or incidents alleged in the complaint, that constitutes Plaintiffs incompetence, negligence and/ or malpractice-

Answer: Forthe identification of such individuals, please refer to the materials previously supplied to the Plaintiff i, the context of his mentoring at TAMC, the external peer review conducted in 1993, the corrective action proceeding conducted at TAMC commencing in July 1993, and the summary suspension proceeding at TAMC commencing in November 1993. To the extent that fUrther discovery might unveil additional individuals, this response willbe supplemented.

3. State the full name, address, employe'. title, positionand social security number of each person not named (in question No 2) above, who was present or claims to have been present immediately before, atthe time of or immediately afterthe events or incidents alleged in the Complaint, that constitutes Plaintiff s incompetence, negligence and/ or malpractice.

Answer: None known at this time. This response will be supplemented, if necessary, after further discovery.

4. State the full name, address, employer, title and position of each person other than yourself and persons heretofore listed or Specifically excluded who have knowledge of the facts described in the complaint or of the injuries and damages following thereform, that constitutes Plaintiff's incompetence, negligence or malpractice.

Answer: See response number 3. Plaintiffs incompetence, negligence and/

5. State the full name, address, employer, title and position of each person possesses any Opi"ion relating to the course of conduct of the medical/clinical care who that was provided to Defendant by Plaintiff, or who may be called to testify at the trial of this cause as to any opinion relating to the course of conduct

of the medical/clinical care provided to Defendant by Plaintiff at any time relevant to the occurrences described in the

Complaint.

Answer: See response number 2.

6. State whether or not you or Defendant Hospital were named or covered under any policy of medical personal property or other liability insurance at the time of care or treatment alleged in the complaint and, if so, state the name of each such company, each policy number, the effective period and the maximum liability limits for each such policy, and for each person and each occurrence and the aggregate amount of coverage of each such policy.

Answer: The hospital and its various employees and agents are afforded a defense pursuant to a policy (or policies) through PHICO Insurance Company as well as the St. Paul Insurance Company (for various of the co-respondents). Upon information and belief, the St. Paul policies are claimants-made policies with $1 million per occurrence coverage, an aggregate of %3 million for general liability claims, and an aggregate of $2 million for claims relating to staff privileges. The declaration sheet for the PHICO policy will be provided if and as it is located.

7. Since the institution of this action, have you been asked to appear before or attend any medical committee, groups, official board of a Medical Society or hospital for the purpose of discussing this case or the occurrences described in the Complaint. If so, state each such date, and each such committee group or board.

Answer: Discussions before the Board and other committees of the hospital are privileged. The hospital, through its Administrative Staff and Board members, has periodically reviewed and discussed the merits of the litigation being pursued

by Dr. Benjamin. Objection is raised as to all such discussions and documentation regarding same.

Penny St. Louis

8 . State whether or not you were ever involved in any proceedings regarding termination, suspension or revocation of medical/hospital privileges of Defendant Physicians. If so, specify any and all sanctions that were handed down as a result of such proceedings.

Answer: Yes. See detailed documentation regarding the suspension ofDr. Benjamin, ad hoc committee reviews, etc., which have been provided previously by the Medical Center.

9. State whether or not you have any information tending to indicate:

(a) That TAMC was, within the five (5) years immediately prior to the occurrences described in the Complaint, sued by any physician or other medical personnel for any reason. If so, state each name and address of such physician, technician or health care worker, the approximate date of such occurrences, and state in general the reason for such occurrences, events or incidents, and

(b) That TAMC has ever been a party in any other law-suit, administrative proceeding, and if so? Give the Court or agency in which filed, the year filed, and the title and docket number of such case or cases.

Answer: To the best of my knowledge, TAMC has not within the five years immediately prior to the occurrences described in the Complaint been sued by any physician or other medical personnel for any reason.

During the course of its 80+ year history, TAMC has occasionally been a party to various law suits either as plaintiff or defendant as well as a wide variety of administrative proceedings. Complete documentation, as requested in the

interrogatory, is either impractical or impossible given the length of time and condition of records
involved. We object to any such requirement. Penny St. Louis

10. Do you have any oral or written statements, or any notes or memoranda of any statements, signed or unsigned, transcribed or not given or acquired by you, your agents or attorneys, from Plaintiff herein, or any person or persons having contact with Plaintiff or any member of Plaintiffs family? If so state :

(a) The name, address, employer, title, position and social security number of

each such person or persons;

(b) The date of each such statement;

(c) The name, address, employer, title and position of any persons having now or previously having had custody of each such statement, or any notes or other memoranda of each such statement;

(d) Whether each such statement was written or oral signed or unsigned and whether or not transcribed.

Answer: The only oral or written statements would be those contained in the presentations by Dr. Benjamin or his representatives at various hearings and meetings in this matter including depositions and discovery proceedings Written statements would be contained in Dr. Benjamin's correspondence to and from the hospital with members of the medical staff, etc., which Dr Benjamin has in his position.

11. State the name, address, phone number, employer, position or job title and occupation of each person you may call as an expert witness at the trial of this cause, including, but not limited to any and all medical care providers.

Answer: This has been previously provided through our attorney.

12. State for each expert set forth above the fields of knowledge in which he/she is expert and the specific areas within those fields of knowledge in which he/she is expert.

Answer: This has been previously provided through our attorney.

13. Identify each and every report prepared on behalf of Defendant Hospital, its counsel, insurance carriers or any representative thereof which was prepared by any expert listed above, and indicate whether said report was submitted in oral form, written
form or both.

(a) For each such report identify any and all data and documents which were
reviewed by such expert in making such report.

(b) For each such report, state the date such report was prepared by such expert and the date each report was communicated to Defendant Hospital, said Defendant's counsel, insurance carrier or other representative.

(c) For each such report identify the name, address, employer, title and
positioil of each person to whom such report was communicated by such experts. (d) For each such oral report state the substance of the report.

(e) For each such written report attach a copy to your answers to these interrogatories.

Objection: We object to the materials requested because they exceed the scope of discovery permitted under F.R.Civ.P. 26. Penny St. Louis, Esq.

Without waiving said objection, Defendant states as follows: No such report

14. Identify the subject matter on which each expert set forth above is expected to testify; state as to each such expert the the facts and opinions to which each such expert is expected to

testify; and state the grounds and basis for each such opinion.
Answer: This has been previously provided through our attorney.

15. Identify all test or experiments each such expert identified above has conducted, or will rely on in his/her testimony in this action.

Answer: No tests or experiments have been conducted to date.

16. Identify each and every article, paper, and textbook Defendant Hospital intends to use during the trial of this cause. State the Authority, publisher, date of publication, edition and pages to be used.

Answer: The hospital's attorney advises me that no final decision has been made

as to information requested in this interrogatory. The materials will be disclosed, as required by the court rules.

17, Identify each and every rule, regulation or guideline of any public authority which you intend to use at the trial of this action. State the citation to them.

Answer: The hospital's attorney advises me that no final decision has been made as to information requested in this interrogatory. The materials will be disclosed, as required by the court rules.

18. Identify each and every rule, regulation, by-law or other document of any association, licensing authority, accrediting authority, inspecting or review authority, or other private body which Defendant Hospital intends to use during the trial of this cause.

Answer: The hospital's attorney advises me that no final decision has been made as to information requested in this interrogatory. The materials will be disclosed, as required by the court rules.

19. Have any other lawsuits been brought against Defendant Hospital alleging denial or revocation of hospital privileges? If so, for each state the following:

(a) The names and last known addresses of each person who brought the action against Defendant Hospital and the law firm representing said Plaintiff; and (b) The docket numbers of each respective lawsuit against said Defendant.

Answer: No, to the best of my knowledge.

20. State the name, address or last known address and specialty of each and every physician with whom Defendant Hospital discussed or consulted about the care and treatment of patients by Dr. Benjamin at any time from the time Dr. Benjamin practiced at TAMC to the present. For each state: The purpose of each such discussion or consultation;

(b) The date and location of each such location of each such discussion or consultation;

The name, address or last known address, employer, title and position of each person who was present during each such discussion or consultation.

Answer: This information is all contained in the documentation generated by Dr. Benjamin or by the hospital and the medical staff with regard to various proceedings involving Dr. Benjamin. These materials will be made available to Dr. Benjamin upon reasonable notice for inspection and copying but they are too voluminous to describe in detail in this answer.

21. Have any other lawsuits ever been brought against Defendant Hospital alleging Sherman Anti-Trust violations? If so, for each state the following:

(a) The names and last known addresses of each person who brought the action against said Defendant and the law firm representing said plaintiff(s); and

(b) The docket numbers of each respective lawsuit against Defendant Hospital .

Answer: No, to the best of my knowledge.

22. Describe any and all records that were made by Defendant Hospital or by any other person in said Defendant's employ or on Defendant's behalf which reflected the medical condition of all patients treated at said hospital by Dr. Benjamin between November, 1991 to December 31, 1993.

Answer: In addition to the patient charts and hospital records themselves, other records would include materials generated by the medical staff or the hospital with regard to complaints concerning Dr. Benjamin's care, which have been previously made available and will be made available again upon reasonable notice.

23. State the name, address or last known address and specialty of each and every physician with whom the Defendant Hospital discussed or consulted about the care and treatment of Dr. Benjamin TAMC patients at any time from November, 1991 to December 31, 1993. For each physician state :

The purpose of each such discussion or consultation;

(b) The date and location of each such discussion or consultation, and

The name, address or last known address, employer, title and position of each person who was present during each such discussion or consultation.

Answer: Please refer to previous answers to interrogatories herein.

24. Has Defendant Peterson ever testimony concerning any hospital privileges similar to that complained of by Plaintiff. Dr. Benjamin in this case if so state: If so, state: such case was filed; testified in Court or given Deposition similar to that complained of by Plaintiff

(a)The caption of each such case and the court agency or entity in which each such case was filed.

(b) The date of such testimony;

(c) The names, addresses and telephone numbers of attorneys representing

the parties to each such case; and
(d) A brief description of the subject matter of the testimony involved in each such instance.

Answer: No.

25. Has Defendant Peterson, had any conversations with Dr. Benjamin other than on the examination or treatment dates heretofore listed? If so state the date of each such conversation state whether the conversation was in person or by telephone, and state the general nature and content of the conversation.

Answer: Defendant Peterson has had numerous discussions with Dr. Benjamin over the course of the years of the doctor's involvement with The Aroostook Medical Center. A number of these would be outlined in the documentation referred to previously in these answers and various other, undocumented events occurred in face-to-face contacts and/or via telephone. The general nature of these conversations varied from time to time ranging from a general exchange of pleasantries in hallway conversation to specific in-office meetings covering a range of subjects from recruitment activities, to employment contract matters, to performance concerns.

26. State whether or not Defendant Hospital or any defendant physician herein were ever involved in any proceedings regarding termination suspension or revocation of their hospital privileges or their license to practice or operate.

Obj ection: Objection is made on the basis of lack of relevance and privilege.

Penny St. Louis, Esq.

Without waiving said objection, Defendant states as follows: No.

27. State whether or not any hearing dealing with mortality or morbidity was held regarding the care and treatment of any patients attended by defendant physicians.

Answer: A specific answer to this question is unknown to me. The hospital has morbidity and mortality conferences under the auspices of the medical staff pursuant to medical staff and hospital bylaws.

28. State the names and addresses of any and all hospitals or other medical institutions or professional associations with which any defendant/physician is affiliated now or was affiliated between November 1991 and December 30, 1993.

Objection: The information requested is burdensome and oppressive because of the scope of the information sought which is not readily available to the Defendant Hospital.

Penny St. Louis, Esq.

Without waiving said objection, Defendant states as follows: Accordiilg to information provided by referenced defendant physicians in applications for appointment or reappointment, the following affiliations are (or were) in effect as detailed below:

hvsician ct

Bruce Alexander, M.D.

EXHIBIT J. APPENDIX TO
REPLY BRIEF IN (APPELLATE COURT)

RE: Dr. Jones

In October of 1992, while working in the Emergency Room, I saw a patient of Dr. Jones's, who was initially seen by Dr. Nancy O'Neill. I followed up on an abdominal CT scar,. The abdominal CT scan was read by myself and Dr. Laurence Watterson. The patient had an adrenal mass over the kidney' whether it was the right or left kidney, f am not certain of at this time. I informed the patient that she did well on her imaging studies and blood tests, everything except for the abdominal CT scan; there was an incidental mass above the kidney and it needed to be followed up with her doctor. I told her it was an incidental tumor, may be cancer, may not be cancer, but that the most important thing was to have follow up with her primary care physician. She did have follow up with her primary care physician; I found out she actually had the follow up visit either in October or November of 1992. I discovered this indirectly, in June of 1993. What Dr. Jones had done, was to try for several hours, he states close to three hours, to convince the patient that there was nothing wrong, that she had no cancer at all. I then reviewed the x-rays and the CAT scan and saw indeed that there was an incidental tumor as I had seen before with Dr. Laurence Watterson. I also reviewed this film with Dr. Farid Bina. He saw the same lesion as I did. When' I read the abdominal CAT scan report, there was no mention of an incidental tumor. Dr. Jones had received the report, reviewed the report of the abdominal CT scan, but did not review the films. But he did not call to speak to me either. It was as if he made the judgment that I had caused the patient needless worry, that I had made an error. He then complained about it bitterly and influenced the minds of several other physicians on the staff committees, who then began to think of me as a physician without good practice sense. Later on, on May 23rd, 1993, Dr. Jones was over heard making unfavorable comments about my admitting practice in the presence of other people,

those other people were Ghislaine Saucier, Dottie Shannon and Robert Shaw. I came out and challenged him on his derogatory remarks and he had no answer.

During the spring of 1993, Dr. Jones was witnessed by two patients of mine, stating to one of the patients that if she left Family Practice and went to Dr. Benjamin's practice, that she would never be allowed into Family Practice again and that Dr. Benjamin would not be around to treat them.

RE: Stephen Wood, M.D.

Dr. Stephen Wood was the internist on-call and the doctor of choice when a patient, came into the Emergency Room. Dr. Robert Maisel saw the patient and requested a consultation from Dr. Wood; he did not provide the consultation on the date of the patient's admission. The patient was referred back to Dr. Nicholas who did not have admitting privileges to the Intensive Care Unit. I was called and Dr. Maisel and Dr. Nicholas pleaded with me to leave my office practice because of a patient left stranded and abandoned in the Emergency Room because Dr. Wood was refusing to come in and see the patient. I came in and took emergency care, more than two-and-a-half hours for this patient. What was important, was that Dr. Wood shows an unwillingness to come and see patients when he is on-call, not only an illness, but an absolute refusal to see patients in an emergency state, a patient that needs to be admitted to the Intensive Care Unit. This is malpractice, negligence, and incompetence at its maximum.

In December of 1993, on a patient named Dr. Wood placed a subclavian line in an inappropriate manner. One Gould even say a negligent manner. The true negligence comes as follows. Dr. Wood ordered a chest x-ray of the patient. He left the hospital grounds and went back to his home. The chest x-ray came in and the chest x-ray was detected by the nurse and by myself, to be

abnormal. I instructed the nurse to please call Dr. Wood at home and tell Dr. Wood the x-rays were ready to be read. Dr. Wood queried the secretary and asked, "Who-is asking me to come in and read this x-ray?" The secretary came into the room while I was seeing the patient and said that Dr. Wood was asking who wanted him to read the x-ray. The secretary was quite

I said, "I will no speak to Dr. Wood." T went and spoke to DR Wood and told him that the x0ray of the patient was ready, that his insultion of the subdavian was inappropriate and that he had best come and take a look at the line. He stated to me that he was now at home, his wife was gone, he was without a car, and that he Gould not come in for close to 30 minutes. Why Dr. Wood Gould not come in at this point, why he did not call a cab or request the police to take him to the hospital in this emergency situation, is not immediately clear. Why he had to wait 20 minutes until Ms wife came back with the automobile, is not clear-cut. His reasoning was not justifiable in leaving a patient in this status. His behavior to the secretary informing him of the x-ray indicates that he did not intend to come and look at the x-ray at that time. For the nurse to inform him that the x-ray was available for him to review and for him to query as to what nurse called him to come look at this x-ray, was an example of his arrogant, incompetent, negligent behavior. This is an episode of gross malpractice.
nervous.

What subsequently occurred was, Dr. Wood came in approximately 30 minutes late, was shaken by looking at the x-ray, expressed to me that he had never seen that happen in a line before, and asked me if I wanted him to reinsert the line. I said, "Please, do not insert the line again." He left.

RE: Arlene Cenedella, M.D.

Dr. Arlene Cenedella sent patient, home with a diagnosis of urinary tract infection, when the actual condition he had was perirectal abscess. L came in on a Sunday with severe pain. On that day, I was not on call, and I was technically on vacation. In addition to this, Dr. Rohe agreed to cover my patients during this'time period and Dr. Silber was the internist on-call. The patient, , went into the Emergency Room, had a urinalysis done, had a rectal performed by Dr. Arlene Cenedella and was told that he had a.urina-.y,tract infection and to go home, after prescribing some antibidtics. The patient called me and told me that he had a severe rectal pain. I explained to him that Dr. Rohe was covering for me at this time and to please call Dr. Rohe. Dr. Rohe was called and told the patient that he was not on-call and that the patient would have to go to the on-call internist. The on-call internist, Dr. Silber, told the patient that his problem had already been treated by Dr. Arlene Cenedella and that if the patient wanted to be admitted, it would be a social admission and the patient would have to be admitted by me. What I had to do was to come in and admit the patient to the hospital and request a consultation from Dr. Bina. Dr. Bina came in and saw the patient and eventually the patient was discovered to have a perirectal abscess. This perirectal abscess was missed by Dr. Arlene Cenedella and was actually detected by myself. In fact, Dr. English examined this patient and stated he did not believe this patient to have have a

perirectal abscess, but went ahead and did the surgery and found that the patient did indeed have a perirectal abscess. What was incredible was that the patient came into the hospital and had a rectal exam performed by Dr. Arlene Cenedella and was told that he did not have a perirectal abscess, and sent rlonl. For ner Co accuse me of negligence, incompetence, and malpractice when she did such an act against this man, is outrageous.

RE: Druce Alexander, M.D.

-r - April, 1993 -- inappropriately diagnosed the patient anb the patient was in severe congestive heart failure and had a mural thrombi. He did not recognize that the patient needed intensive care setting treatment and the patient's family begged me to take over her care, which I did. The patient needed her intravenous fluids removed and an echocardiogram ordered. To give you an idea of how many cc, of fluid she had, she had more than 3,000 cc. of intravenous fluids in her body that had to be removed during her hospitaliz ation. Also, an echocardiogram should have been ordered at some point after her discharge from the hospital and after her first subacute myoc ard i al infarction during her discharge period, and it was not. The patient had a large mural thrombi and Dr. Kradzinski reported to me that it was perhaps a good idea that the patient asked that I take over the patient's care because of the poor care rendered by Dr. Bruce Alexander.

- ` had a perforated bowel. X-rays were taken at The Aroostook Medics
1 CenteF but were not acted on. She went to Banger where she died on
Christmas Eve day, from complications of perforated bowel. There was clearly enough time for her to be treated here had the x-rays been acted on.

RE: Dr. Robert Shaw

Dr. Shaw, during the process of my being evaluated, reported a letter that was damning to me, stated that there were a number of concerns and charts that Dr. Rohe had and he listed the chart numbers. In a number of the charts, DR. Rohe had actually stated that the patient's care was satisfactory. The way i.t was stated in Dr. Shaw's letter is that all the charts were ones that Dr. Rohe had concerns about. The chart of Dr. David Jones that was reported to be of a negative nature about me, was also a misrepresentation of the care that was rendered to the patient.

RE: Dr. Ronaid Rohe

Dr. Ronald Rohe left for vacation on a day that he was on-call. He called the office and asked for me to cover for him which I did. I covered for his two patients that came in during the shift that he would have been on. In addition to that, during the whole week that he was gone, I was on-call a second time, took one of his patients, a- -L took care of her during the entire time he was gone which was a total bftenldays until he was able to come back and take over the patient's care. The patient remained in the hospital for several days afterwards and was discharged in satisfactory condition. None of the three patients that I took care of for Dr. Rohe were in any way harmed. They did well during that hospitalization and discharged in fine fashion. Dr. Rohe came back and thanked me for taking care of his

patients and also stated that he had never, in his 16 years, ever made this

gross error. One Gould call this abandonment and one Gould call this incompetence and one Gould call this negligence, but Dr. Rohe did indeed do

this.

Dr. Ronald Rohe refused to meet with me and my father during a proctoring session and later on, we met during the sumner and resolved any differences that we may have had in January, 1993. No resistance to proctoring effort was performed. The definition of resistancenow is "act or power of resisting; a force that opposes .another; opposition to the flow of an electric current through a circuit or a piece of conducting material." That is the definition of resistance in the Random House Dictionary.

RE: Maryann Kradzinski-Walsh

Dr. Kradzinski-Waish has made several errors, the most recent being

- who was not stabilized and with unstable road conditions, she sent him
down to Eastern Maine Medical Center. The man died. He had a cardiac event on the way down. He had to be taken to a hospital in Millinocket and died there. This was a major error performed by Dr. Maryann Kradzinski-Walsh, , an example of gross malpractice, incompetence, and negligence.

Dr. Kradzinski-Walsh made another major error on a patient with post infarct angina. This patient E-,had-;reported on in a special report. The patient had had an myocardial infarction and, postinfarctio?_angina, and she was'trying to discharge the patient too soon. The patient subsequently had :B second mj/ocardial infarction and was required to be readmitted to the Intensive CAre Unit of the hospital. This patient died. This is an example of gross malpractice, incompetence, and negligence.

019777000468 12/14/93 SUSPECTED DUPLICATE

DR JAMES BENJAMIN
171 ACADEMY ST

PRESQUE ISLE ME 04769-3103 PROC Exhibit "Q"

THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2077646808 TDBN PRESQUE ISLE ME 331 12-14 1230P EST 9334809992867875-1

2077684000 DAVID A PETERSON EXECUTIVE DIRECTOR RPT DLY MGM COPY MESSAG

ATTORNEY MCLWE HEARING OFFICER AROOSTOOK MEDICAL CENTER
140 ACADEMY ST
PRESQUE ISLE ME 04769

DEAR MR PETERSON AND MCLWE,
THIS CONFIRMS MY LETTER OF 12/9/93 IN REGARDS TERMINATION OF MEDICAL STAFF PRIVILEDGES. NOW COMES JAMES BENJAMIN JR MD AND MOVES TO STRIKE AND REMOVE THE FOLLOWING PERSONS FROM THE HEARING PANEL FOR
THE ABOVE ENTITLED MATTER.
1; MOVE TO STRIKE AND REMOVE FROM THE HEARING PANEL NANCY ONEAL AND ROBERT SHAW MD BECAUSE THEY ARE IN DIRECT ECONOMIC COMPETION WITH JAMES BENJAMIN JR MD, THE APPELLATE HEREIN. FURTHER, NANCY ONEAL MD IS ASSOCIATED WITH BRUCE ALEXANDER MD WHO

CHAIRED THE AD HOC COMITTEE WHICH MADE THE ADVERSE FINDINGS AGAINST THE APPELLANT; 2. UPON INFORMATION AND BELIEF I MOVE TO STRIKE AND REMOVE WESLEY ENGLISH MD. FROM THE HEARING PANEL BECAUSE I AM INFORMED AND I REASONABLY BELIEVE HIS AROOSTOOK SURGICAL PRACTICE IS RELATED TO AND TIED IN WITH THE ACCUSING HOSPITAL, THE AROOSTOOK MEDICAL CENTER; 3. I MOVE TO STRIKE AND REMOVE LAWRENCE WATERSON MD FROM THE HEARING PANEL BECAUSE, IN THE PAST HE HAS, IN VIOLATION OF HIS HIPPOCRATIC OATH, REFUSED TO PERFORM X-RAYS FOR MY PATIENTi AND, 4. I MOVE TO STRIKE AND REMOVE ARLENE CENEDELLA MD. FROM THE HEARING PANEL ON THE GROUNDS THAT AS CHAIRPERSON OF THE CREDENTIALS COMMITTEE SHE PARTICIPATED IN THE CONSIDERATION OF CORRECT PROCESS AND THE ADVERSE RECOMMENDATIONS. HOW CAN AN ENTIRE PANEL, EACH PERSON ON HIS OWN, WITH.EXHIBITED BIAS AND PREJUDICE PRETEND To BE A FAIR AND IMPARTIAL HEARING PANEL. ARTICLE 8, SECTION 4A OF THE AROOSTOOK MEDICAL CENTER BYLAWS EXPRESSLY PROHIBITS A "STAFF MEMBER WHO HAS ACTIVELY PARTICIPATED IN THE CONSIDERATION OF THE ADVERSE RECOMMEDATION" FROM ACTING AS A HEARING PANELIST. FURTHER THE BYLAWS BAR PARTICIPATION BY A PANELIST WHO IS "IN DIRECT ECONOMIC COMPETION WITH THE PHYSICIAN UNDER REVIEW." IN ADDITION, THE HEARING PANEL AS IT IS PRESENTLY CONSTITUTED VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION

CLAUSES OF THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION MADE AND PROVIDED FOR SUCH MATTERS AND CIRCUMSTANCES.

SINCERLY

DR JAMES BENJAMIN JR MD PRO SE

14959 19:29 EST

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
CV-95-253-B

JAMES BENJAMIN, JR., M.D. Plaintiff v. THE AROOSTOOK MEDICAL CENTER, INC., ET AL., Defendants	DISPOSITIVE MOTION #1 - MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS

Defendants herein, pursuant to F.R.Civ. 56, move the Court to enter judgment on their behalf on all claims asserted by Dr. Benjamin in this proceeding for the reason that the Plaintiff is not entitled to any relief as requested. For purposes of analysis, the Motion will be divided into two sections, the first dealing with all damages generally and the immunities under State and Federal law. The second part will deal with the so-called "anti-trust" claims which suffer from a total failure of proof.

1. Statement of the case

The Plaintiff has brought three separate complaints against the various Defendants herein at different times. Complaint #1 was originally filed in the State Court (See MFSJ Exhibit 1, Aroostook County Docket No. 93-296). In that "State Court" Complaint, Dr. Benjamin alleged defamation, improper termination and/or refusal to renew staff privileges and violations of the TAMC bylaws in connection with various peer review/corrective actions taken against him by TAMC and its various committees including the medical staff subcommittees. After extended discovery, all claims were dismissed with prejudice by Justice Paul Pierson of the Superior Court (a copy of the Orders of Justice Pierson in this regard are attached as MFSJ Exhibit 2).

In the second Complaint (Docket No. 94-0006-B), Dr. Benjamin alleged violations of his civil rights by the actions of the Hospital and its committees resulting in summary suspension of him. The Complaint in the first Federal case was dismissed by United States District Court Judge Morton Brody on August 17, 1994, for Dr. Benjamin's failure to prosecute the case and participate in Motion hearings (a copy of the dismissal order is attached hereto as MFSJ Exhibit 3) On appeal to the First Circuit Court ofAppeals, the District Court's dismissal was deemed appropriate but the "with prejudice" aspect of it was vacated.

The third Complaint (the present case), following amendment, alleges three basic entitlements to relief:

a. Attempts to monopolize medical services, aided and abetted by various other Defendants and pursuant to U.S.C. Sect. 2 (See generally, Complaint, Paragraph XXI, Page 12).

b. Count II alleges a denial of Hospital privileges as a result of alleged racial discrimination under 42 USC Sect. 1981 and Sect. 1983 (Complaint, Paragraph XLII, Pages 20, 22).

c. Count III alleges malicious abuse of reports by TAMC to the Maine State Board of Registration (November 18, 1993) and, thence, to the National Practitioner Data Bank (January 4, 1994), from the reports of Mr. Peterson, President of The Aroostook Medical Center and a report by Mr. Peterson MFSJ Exhibits 4 and 5 respectively].

II. Argument.

All the "non-anti-trust" claims are barred by the privileges and immunities provisions of Federal and State Law. Judgment in Defendants favor must be granted. M.R.Civ.P 56.

MALICIOUS ABUSE OF REPORT UNSUPPORTEID

Abuse of process has been defined under Maine law as the "employment of a process in a manner not contemplated by the law." Nadeau v. State of Maine, 395 A.2d 107, 1 1 7 (Me. 1978). Elements necessary to state a viable claim of abuse of process include: i) a use of process in a manner not in the regular conduct of the proceedings and 2) the existence of an ulterior motive. Id. Under the facts of this case, the Defendants' action, i.e. the report made by TAMC Chief Executive Officer David Peterson to the Maine State Board of Licensure in Medicine on November 18, 1993 and to the National Data Bank on January 4, 1994, in all respects was pursuant to a process mandated by law. As such, Plaintiff's claim is without merit.

Title 42 USC Sect.11133 mandates the reporting of disciplinary actions against physicians which extend 30 days or more. Title 24 M.R.S.A. Sect. 2506 mandates the reporting of any disciplinary actions against a physician. In accordance with the terms of 42 USC Sect 11133 and 24 MRSA Sect. 2506 (as well as the Joint Commission on Accreditation of Hospitals, JCOAH Accreditation Manual for Hospital/89 Sect. Standard

MS.1, 2, 2.1, and TAMC's adopted staff and hospital bylaws) (See MFSJ Exhibits 6 and 7 respectively) the Hospital, by written correspondence, communicated to the State Board and National Data Bank, the suspension (and ultimate termination) of the Plaintiffs medical staff privileges at TAMC. Contrary to the claim asserted by the Plaintiff, the Defendant Hospital followed the regular course of reporting mandated by federal and state law. In fact, both 42 USC Sect. 11111 and 24 MRSA Sect. 2511, provide for immunity from liability to those individuals who follow the reporting mandates of these statutory provisions. In this case, the Defendants did not waive any of the immunities bestowed upon them by these state and federal statutes.

In 1986 the federal government recognized the need for protection from liability for those individuals participating in the self-regulation of the practice of medicine. In response to "the overriding national need to provide incentive and protection for physicians engaging in effective professional peer review," 42 U.S.C. Sect. 11101, 1 101, Congress enacted 42 U.S.C. Sect. 11111 which clearly provides immunity from liability for all those, physicians and others, participating in medical peer review. Section 11111 also reads, in part:

> (3) Exception
> If the Secretary has reason to believe the health care entity has failed to report information in accordance with section 11133(a) of this title, the Secretary shall conduct an investigation. If... the Secretary determines that the health care entity failed substantially to report information in accordance with section I I of this title...the protections of subsection (a)(l) of th is section shall not apply...

Section 11133 mandates:

> (a) Reporting by health care entities

(1)On physicians
Each health care which -

(A) takes a professional review action that adversely affects the clinical privileges ofa physician for a period longer than 30 days...shall report to the Board of Medical E;uaminers, in accordance with section 11134(a) of this title, the information described in paragraph (3).

In this case the peer review proceedings conducted by TAMC did result in the suspension and ultimate termination of the Plaintiffs hospital privileges. The named Defendants are immune from liability were because the Defendants' conduct comported with the requirements necessary to invoke the immunity, namely:

1. Sect. 11112(a)(l) The reporting of Dr. Benjamin's unavailability, the Ad Hoc Committee review of Dr. Benjamin's professional performance, and the 11/10/93 summary suspension was undertaken in the reasonable belief that it was in furtherance of medical care;
2. Sect. 11112(a)(2) The summary suspension, and ultimate revocation of Plaintiff's staff privileges, was imposed by TAMC after a reasonable effort to obtain the facts of the matter;
3. Sect. 11112(a)(3) The Plaintiff was afforded adequate notice and hearing procedure or such other procedure as was fair to the physician under the circumstances;
4. Sect. 11112(a)(4) The Defendants acted in the reasonable belief that their actions were warranted.

42 USC Sect. 11111 et seq. Importantly, the law PRESUMES these reauirements to be met by TAMC. 42 U.S.C. Sect. 11112(a). 1 1 1 12(a). The Plaintiff has not rebutted, and is unable to rebut, this presumption.[18]

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[18] It is anticipated that the Plaintiff will argue that whether the Defendants operated under a "reasonable belief' as required-by 42 U.S.C. 4 1 1 1 11, is a

To fulfill requirement 1, the Defendants must establish "with the information available to them at the time of the professional review action, [Defendants] would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." Fobbs v. Holy Cross Health System Corn., 795 F. Supp. 1054, 1065, (E.D. Gal. 1992) citing, H. R. Rep. No. 903, 99th Gong., 2nd Sess. 10. The gravamen of all Plaintiffs allegations of improper Pnnrting Park back to TAMC's peer review process. In October and November 1993, the report Plaintiffs performance as a physician at TAPVIC was evaluated by a committee charged with recommending to the TAMC Board whether, based on his professional competence, Plaintiffs hospital privileges should be suspended and ultimately terminated. This Committee recommended Dr. Benjamin's nrivilroes should be suspended, and should not be renewed, based on concerns they had with his professional competence. The Plaintiff was fully informed of the action taken against him. He ultimately took advantage of the appeal process afforded him under TAMC bylaws. In December 1993, after the Plaintiff resigned his position at the Hospital, TAMC terminated his staff privileges. This Fllit nmnno others, followed that conclusion.

The activity of the peer review involving this Plaintiff, including the communications to the National Data Bank, 42 USC Sect. 111gfd and the Maine Board of Licensure in Medicine, 24 MRSA Sect. 2506, was taken in the reasonable belief that such action was warranted to effectuate quality patient care. 42 USC Sect. 11112. It was taken according to and within the parameters of state and federal law. This has been conclusively established by the ruling of Justice Paul

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factual question precluding summary disposition of the issue by the Court, pretrial. This issue was directly addressed by the California federal court in Fobbs v. Holy Cross Health System Com., 789 F.Supp. 105J. 1066 (E.D. Gal. 1993-) which declined to adopt this proposition, finding, as did the court in Austin v. McNamara, 731 F.Supp. 93.4 (C.D.CA 1990), that "the question of immunity [under HCQIA] is a matter of law."

Pierson of the Maine State Superior Court, in his ruling of June h 1 1995 (See MFSJ Fuhihit 2) There, the Court examined the same set of facts as relied upon by the Plaintiff to this actioh. The Court stated,

> Given the evidence before the committee, Benjamin has failed to prove that its initial decision to suspend him was unreasonable. The hospital's bylaws provide for summary suspension by the Medical Staff Chairman if he determines that a physician's conduct requires immediate action "to protect the life or well-being of patient(s) [sie] or to reduce a substantial and imminent likelihood of significant impairment of the life. health, safety of any patient, prospective patient, or the person" Bylaws of the Medical Staff of The Aroostook Medical Center Article VII g 2(a):see also 42 USC Sect. 11112(c). 1 12(c). On November 10th, the Chairman and committee had such evidence before them that it was not unreasonable for them to conclude that Benjamin was unavailable at a time when he had patients who were not otherwise being attended by a physician. This lack of access to a physician reasonably Gould be construed as endangering the life or well-being of these patients within the m'eaning of the bylaws. The November 10th review actions, therefore, were not unreasonable.

As a result of this finding, the Court held that the immunity provisions of42 USC Sect. 11111 1 1 1 1 1 et seq. and 21 MRSA 92506 applied to the actions by the Defendants, includine the action of reporting its disciplinary action to the Maine State Board of licensure in Medicine (See Count VII of Plaintiffs State Court Complaint).

Given the doctrine of collateral estoeoel, the June 6, 1995 determination of the State Superior Justice Pierson orecl;hes the Plaintiff from asserting that the immunity provisions of 42 USC S11111 et. sea, do not apply to the facts herein asserted. The State Court established the Defendants' actions in the peer review process -- from the initial investigation of the Plaintiff s professional competence and conduct, to the reporting to the Maine State Board of Licensure in Medicine of the disciplinary action taken by the Hospital against the Plaintiff -- was protected by the immunity provisions of 42 USC Sect. 11111 1 1 1 1 1 and 24 M.R.S.A. 925 1 i. Such a conclusion is bindino, upon the Plaintiff to this action. Where a litigant has had a fair opportunity to fUlly litigate an issue, as did Benjamin in the state court proceedings, a federal court's decision to give preclusive effect vel non to a state courtjudgment is not discretionary. Nanavati v. Burd;tte Tomlin Memorial Hospital, 857 F.2d 96, 110 (3rd Cir. 1988), citing Kremer v. Chemical Construction Corp., 456 US 461, 480-52 (1982).

Correspondingly, this Court must find that the actions by TAMC in reporting its conduct with respect to Dr. Benjamin to the National Data Bank on January 4, 1995, which flowed from the same peer review process analyzed by Justice Pierson, also protected by the immunity provisions of 42 USC Sect. 11111 et. 1 1 1 1 1 et. sea. and 34 MRSA Sect. 2511. 1 I.

In reporting the termination of the Plaintiff s staff privileges at TAMC to the state and national bodies, the Hospital did no more than follow the mandates set forth in the Health Care Quality Improvement Act (mimicked in the Maine Health Security Act). It did not abuse the immunity bestowed upon it. In fact, the Plaintiffs Complaint is void of any factual support for his allegations that the Hospital's conduct in making such report was "malicious," which would destroy the immunity granted to Defendants by statute. Gnat v. Pen Bay Medical Center, 573 A.7d 872 (Me. 1990), citing Mendez v. Benson, 739 F.2d 15 (Ist Cir. 1984). But for the conclusory statements asserted by Plaintiff, the pleadings contain no support for the allegation of

malicious conduct by Defendants. Thus, the immunity of 42 U.S.C. Sect. 11111 1 1 Ii and 24 M.R.S.A. Sect. 2511 protect the Defendants' from liability in the asserted abuse of process claim.

The Court should alsoconsider the Plaintiff s failure in the State Court, to to claim an abuse of reporting by the Defendants to the National Date! Bank, as a waiver to any such assertion now. All claims which Gould have been brought in that earlier action, should have been brought. Federated I)eoartment Stores. Inc. v. Moitie, 452 US 394, 398 (1981). Otherwise, as here, the courts are asked to evaluate cases in a piecemeal fashion, the direct evil which claim preclusion attempts to remedy. If piecemeal claims were condoned, a plaintiff would be allowed to engage in forum shopping; having received an unfavorable ruling in one court, he may try for a more favorable result by filing a similar claim in a second court. This should not be allowed.

Based on the foregoing, dismissal of Plaintiffs suit or, in the alternative, summaj judgment in Defendants' favor, is mandated. ?he Plaintiff s claim of "abuse of process" groundless and must be dismissed. He has failed to generate any material factual dispute to be presented to ajury.

b. <u>Plaintiffs Civil Riohts Claim Is Without Merit</u>

The Plaintiff claims the Hospital's action in terminating his staff privileges was the result of racial animus, but fails to provide any proof- absent his own self-serving statements - in this regard. The Defendants urge the Court to dismiss the Plaintiff's "civil rights" claims as legally invalid and factually unsupported.

42 USC Sect. 1983

The Plaintiffs claim of TAMC's violation of 42 USC Sect. 1983 fails because TAMC is a private entity and not a "state

actor." Thus, neither 42 U.S.C. Sect. 1983, nor the Fifth or Fourteenth Amendment to the U.S. Constitution provide any basis for relief in this action.

A civil rights claim brought pursuant to 42 U.S.C. Sect. 1983 only allows suit against those who act "under color of state" law and who deprive another of a constitutionally or federally (protected right. Monroe v. Pane, 365 U.S. 167, 184-85 (1961). An individual acts under color of state law when "there is a sufficiently close nexus between the State and the challenged action of the regulated entity that the action of the latter may fairly be treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). Whether the Defendant's conduct of disciplining Dr. Benjamin falls within the parameters of Sect. 1983 is a question of law. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

The Plaintiff has no baris for a claim under 91983 because the Defendant is not as state actor. The Plaintiffs Complaint strives (to no avail) to fulfill the "state action" requirement by forcing a "connection" between the conduct of TAMC and the regulatory mandates of both federal and state law. He goes to great lengths in describing TAMC's receipt of federal HillBurton funds and miscellaneous state and municipality funds. As well, Plaintiff describes the Hospital's required compliance with the state licensing regulations, hoping to meet the threshold prong of a civil right cause of action. Such assertions are insufficient to demonstrate the "state action" necessary to invoke 42 USC Sect. 1983 or challenges under the Fifth or Fourteenth Amendments to the U.S. Constitution.

Rendell-Baker v. Kohn, 457 U.S. 830 (1982), recognired that 42 U.S.C. Sect. 1983 does not reach private action but rather "prohibits interference with federal rights under color of state law." Many federal cases have dealt directly with the issue of whether a hospitals acceptance of governmental funds automatically classifies it as an entity whose conduct may be fairly attributable to the State. Although recognizing the case by case basis upon which this issue must be analyzed, the majority of federal courts have answered this question in the negative.

In Mendez v. Belton, 739 F.2d 15 (Ist Cir. 1984) a physician brought a civil rights action pursuant to 42 U.S.C. Sect. 1983 against a orivate. nonprofit hospital, its trustees, administrators and doctors following the revocation of her hospital staff privileges. In analyzing whether the hospital acted under color of state law the court made note of the hospitals tax-exempt status, its receipt of federal financial assistance under Hill-Burton program, Medicare and Medicaid funding, and the hospitals conformance to "a panoply of government health care regulations. Id. at 17. Nonetheless the court found the plaintiff failed to establish that the hospital acted "under color of state law" when revoking the doctor's staff privileges:

> Every circuit that has addressed the issue has decided that extensive government regulation and the receipt of Hill-Burton construction funds, and tax-exempt status do not transform an otherwise private hospital into a government actor.

citino Loh-Seng Yo v. Cibola General Hospital, 706 F.2d 306, 30708 (10th Cir. 1953); Hedge v. Paoli Memorial Hospital, 576 F.2d 563, 564 (3rd. Cir. 1975) (per curiam) (citing many cases).

The court in Modaber v. Culver Memorial Hospital. Inc., 674 F.2d 1023, 1027 (1982), again looking at the issue in the context of a dispute over the hospitals revocation of a doctor's privileges, definitely concluded:

> The staff privileges decisions of a hospital which receives Hill Burton Act funds, accepts Medicare and Medicaid patients and reports privileges revocations to state medical licensing authorities do not constitute state action.,

(emphasis added). Thus, even accepting the Plaintiffs allegations that TAMC receives federal, state and municipal funds, and is subject to state and federal regulatory measures, that is

insufficient to establish the hospital acted on behalf of the government in taking disciplinary

action against Dr. Benjamin. The Plaintiff makes no assertion that any of the Defendants were acting on behalf of, or at the behest of, any governmental entity when suspending (or revoking) his staff privileges. In fact, the Plaintiff is unable to make such assertion because it is clear that TAMC is a nonprofit, orivate hospital facility, which operates independently of state or federal control necessary to qualify as acting "under color of state" for purposes of 42 U.S.C. Sect. 1983 and/or the Fifth or Fourteenth Amendments.

It is clear that no set of circumstances may be presented under which the Plaintiff would be entitled to relief pursuant to 42 U.S.C. 91983 or the Fifth or Fourteenth Amendments to either the U.S. or Maine Constitutions. The Plaintiffs S1983 claims and claims of Constitutional violations must be dismissed.

42 USC 91981

Count II of the Plaintiff s Complaint alleges a violation of his civil rights pursuant to 42 USC Sect. 1981 and resulting from TAMC's "racially discriminatory policies." (See Plaintiffs Complaint at Count II, p. 20.) In order to prove a violation of 42 USC Sect. 1981, however, the Plaintiff must demonstrate that the conduct complained of is prohibited by g 1981. "Where an alleged act of discrimination does not involve the impairment of one of these specific rights, Sect. 1981 provides no relief. Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly limits discrimination only in the making and enforcement of contracts." Patterson v. McLean Credit Union, 491 US 164, 176 (1989).

The Complaint filed by the Plaintiff alleges that he was granted provisional, as opposed to full, staff privileges in February, 1992. Such an allegation may pass the threshold requirement

to assert a cause of action under 42 USC Sect. 1981. However, the utter lack of proof that the grant of the provisional privileges resulted from a racial animus defeats the claim.[19]

Therefore, having identified the one claim which arnuablv may fall within the gambit of a Sect. 1981 cause of action (i.e., that TAMC failed to bestow upon the Plaintiff full staff privileges upon his application in February 1993) an analysis of the evidence (or, rather, the lack of it) in support of this assertion establishes that the claim must be dismissed. The Plaintiff fails to substantiate that the alleged discrimination was purposeful and, more importantly, based on race. General Building Contractors Ass'n. v Pennsylvania 458 US 375, 391 (1982). Thus, he fails to generate a genuine issue of material fact to support presenting this claim to ajury. F.R. Civ. P. 56.

The key question to be answered by the court in evaluating the Plaintiffs Sect. 1981 claim is whether the Plaintiff has assembled soecific facts adequate to show, or raise a plausible inference, that he was subjected to race-based discrimination when he was granted provisional appointment to TAMC's medical staff. The Dartmouth Review v. Dartmouth Colleoe. et. al., 889 F.2d 13, 17 (ist Cir. 1989). Mere allegations in this regard do not suffice. Id, at 19, citing, Jafree v. Barber, 689 F.2d 640, 643 (7th Cir. 1982). None of the six Defendants whom the Plaintiff deposed were questioned by the Plaintiff about the Hospital's initial decision to grant the Plaintiff provisional privileges. Moreover, the fact that TAMC recruited the Plaintiff to stay on as a physician of internal medicine,

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[19] The Plaintiffs additional "claims" to relief under 42 USC Sect. 1981 do not qualify under the terms of that statutory provision. Those claims, found within the Plaintiff s "Count Two," consist of Nurses McBumie and Cuerette's failure to abide by the Plaintiffs medical orders (page 19 of the Complaint); Dr. Wood's evaluations of the Plaintiffs performance as a physician at TAMC (page 19 of the Complaint); and that physicians at TAMC would not cover the Plaintiffs patients, for whatever reason, also fails to allege a S 198 I cause of action. (See Plaintiffs Complaint at page 16). None of these "claims" deal with entering or enforcing a contract.

fellowing his stint at the facility as a locums tenens, is logically inconsistent with the Plaintiff s assertion of racial discrimination, or the Hospital's

"racially discriminatory policy." To allege that the Hospital discriminated against the Plaintiff because of his race, while simultaneously recruiting him to practice medicine in the northern part of the state, is illogical. Far from supporting a reasoned inference of discrimination based on race, the conduct of the Defendants proves no more than that the hospital wanted the opportunity to monitor the physician's competence, as it would any other physician, before granting him full privileges.[20] As was recognized explicitly in Jefferson Parish Hospital District, 30 (1953), a hospital possesses the unquestioned right to exercise No. 2. v. Hvde, 466 US some control over the identity and number of doctors to whom it accords staff privileges.

The only evidence adduced during discovery on the issue of racial animus behind the

Plaintiffs provisional privileges was from the Plaintiff, himself:

Q. Now, of the GI procedures, from the way I read this sheet, everything thnt you requested you received privileges for. Am I misreading that?
A. Just certain things, No, the portion where you are correct, just about everything that I requested was approved. But colonoscopy -- colonoscopy, colonoscopy with biopsy, colonoscopy with coagulation therapy, colonoscopy with polypectomy, colonoscopy with removal of foreign body were all initially approved and then were denied.

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[20] As it turned out, this was a well reasoned decision given the quality of care complaints which subsequently surfaced as a result of the Plaintiffs medical practices.

And that is part of the reason I had a discussion with Dr. Robert Shaw in the summer of 1992 was concerning these and other things that I thought that I should be able to do that I wasn't.

Q. Okay. Now, what was the business with Dr. Shaw? Would you explain that again to me?

A. Well, he was explaining why some of the privileges were -- why some of the
privileges were okayed and some were not.

Q. Which ones were not?

A. Colonoscopy, colonoscopy with biopsy, colonoscopy with coagulation therapy,
with polypectomy and with removal of foreign body.

Q. And what was the explanation to you as to why they were not approved?

A. He said they were not approved because when they sought additional documentation they Gould not find it.

Q. So he wanted no surgeons and no internists getting into his turf, if we can be so brass?

A. That is not what he said, but what he did say, he did not want internists nor -- he said that -- he said maybe you can do some of these procedures, but, he said, you are going to be

so busy dealing with your practice that you will not have time to do the procedures. I disagreed with him on that point.

But when trying to make arrangements to get an endoscopy done, it was -- you would call the nurse that was on call or whatever to do a procedure that you Gould do, that you have privileges to do; and the call would be made to Dr. Silber, and Dr. Silber would stop the GI nurses from coming in so that you Gould not do the procedure.

(See MFSJ Exhibit 8). No more needs to be said,

Other than conclusory statements and subjective characterizations of discriminatory conduct, the Plaintiff has not proven racial animus existed on behalf of the Hospital in its denial of Plaintiff s application for full staff privileges. Oliver v.

Dioitai Equipment Corp.,846 F.?d 103, 108 (Ist Cir. 1988). As a matter of law, summary judgment in Defendants' favor must be granted because the action of TAMC in granting the Plaintiff "provisional privilege," does net violate 42 USC Sect. 1981.

c. Plaintiff Antitrust Claims Are Unsupported

Count I of the Plaintiff s ilomplaint alleges the Defendants violated section two of the Sherman Act by monopolizing, attempting to monopolize, or combining or conspiring to monopolize a part of the medical trade. The Plaintiff is unable to prove the requisite elements of
such allegations and therefore his claims must be dismissed as a matter of law.

1. Necessary Jurisdiction To Hear Claims Is Missing

The recent First Circuit case of San luan Cement. Inc. v. Puerto Rico Cement Co. Inc., 1996 U.S.Dist. LEXIS 5646 at p. 20, which follows Summit Health. Ltd, v. Pinhas, 500 U.S. 32:! (199 i), articulates the First Circuit's approach to antitrust jurisdiction in the first instance. The threshold is low. The Court requires a Plaintiff to allege a general connection with interstate commerce, and "an effect" thereon resulting from the Defendants' allegedly illegal conduct. In this case the facts pleaded by the Plaintiff demonstrate favorable effects upon interstatc: commerce as a result of the Defendants conduct.

At first Plaintiff states that most products and supplier sold and delivered to plaintiff for use in his medical practice are manufactured in various parts of the U.S. and shipped to that State of Maine in interrtate commerce. He then goes on to state in paragraph 26 that, as a result of the Defendants' conduct, he "was and is able to attract and provide Canadian patients who travel in interstate commerce. By opening a new oftice, Plaintiff was

forced to enpand warehouse and storage space so Plaintiff Gould keep on hand as essential inventory of medications and supplies to meet his new and increased patient needs." By virtue of the Plaintiff's own pleadings the result of the Defendants' conduct on the interstate commerce was favorable, in that it increased the supplies the Plaintiff ordered through interstate commerce, and in addition, allowed him the opportunity to service increased patient needs.

The Plaintiffs "Count One" alleges a violation of 42 USC 92. (See Plaintiffs Complaint at Paragraph XXI, p. 12). Monopoiization under 15 USC Sect. 2 focuses on the actions of a single firm to control a market. Oksanen v. Page Memorial Hosoital, 945 F.2d 696, 710 (4th Cir. 1991). Two elements must be proven to demonstrate a viable claim of monopolization. First, the Plaintiff must demonstrate that the Defendant possessed monopoly power in the relevant market; and second, that the Defendant willfully acquired or maintained such power as distinguished from growth or development as a consequence ofa superior product, business acumen, or historic accident. Id.; Tarabishi v. McAlester, 951 F.2d 1558, 1567 (lOth Cir. 1991). Both market power and relevant markets are difficult concepts dealing with complex issues of economics not easily understood in the absence of expert testimony. The Plaintiff has identified no expert who will testify in this regard. Unless the monopoly power and the market at issue are blatantly obvious, defining the relevant market is indispensable to a monopolization claim. Brader v. Allegheny General Hospital, 64 F.3d 869, 877 (id 1995); MorPan. Strand. Wheeler and Biggs v. Radiology Ltd., 924 F.2d 1483, 1491 (9th Cir. 1991). Otherwise, "proofof monopoly power requires a showing of both power to control prices and power to exclude competition. (Citations omitted.) Determination of the existence of monopoly power requires proof of relevant product and geographic markets." Tarabishi at 1567. Failure of such proof is fatal to a plaintiff's monopolization claim. Id

The Plaintiffs Complaint makes assertions regarding relevant markets and geographic markets, but the statements made are contradictory. For example, with regard to geographic markets,[21] The Complaint states, "Defendant also render medical services and related health services within the State of Maine. Defendant has at all material times had dominant position within the health care services market in the Presaue Isle, Maine area;" fiV, p. 8. "The services described...are used by persons...in the State;" 7V 11, p. 8. "Defendant is the only hospital in the City of Presque Isle, Maine. Their health care services can fulfill the needs for all persons in the communities surrounding Presaue Isle. Maine;" fiX, p.9 "In addition, other medical hospitals are located in the City of Caribou and the Town of Houlton, Maine, but the said hospitals are not "convenient" to persons residing in the City of Presque Isle, Maine;" and llXV 1 1 1, p. 1 i. "...Defendant was the exclusive hospital in the State of the Maine for the greater Presaue Isle. Maine area." Plaintiff never does define the geographic market allegedly relevant to his antitrust claims. In addition, "for antitrust purposes, defining product market involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." Radiolow Ltd., 924 F.2d at 1489. In describing the relevant product market, Plaintiff variously describes it as "medical services, related health services and health care services" (flV, p. 8); "provision of inpatient and outpatient care, health related research and educational activities of an organized and qualified medical

staff(flVI, p. 8); full and complete health care services including dissemination of public health care information regarding new services and the proper way in which to use services and medication ('IIXII, p. 9); all related medical services, testing,

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[21] Geographic market is defined as "an area of effective competition... where buyers can turn for alternate sources of supply." Moore v. Jas. H. Manhews & Co., 550 F.ld 1207, 1228 (9th Cir. 1977).

experiments, pharmaceutical and nursing care together with physician services (IIXIII, p. 10). There remains a lack of any identifiable product market allegedly at issue here.

Despite the blanket statements in the Plaintiff's Complaint, he has provided no proof, whatsoever, of either market power possessed by TAMC or the geographic market. (See Plaintiffs deposition, dated i/28/96 and 3/29/96, MFSJ Exhibits 9 and 10 respectively). Nor has the Plaintiff proffered any expert testimony on these highly technical questions. Morgan, 924 F.2d at 1490.

Even assuming for the sake of argument that the Plaintiff Gould prove market power, the Plaintiff must still establish that TAMC willfully acquired such power or sought to maintain it.[22] The Plaintiff would need to show "that ajury Gould find no valid business reason or concern for efficiency in the hospitals' choice to revoke his privileges." Ol<sanen at 710, citing White v. Rockingham Radiologists. Ltd., 820 F.2d 98, 105 (4th Cir. 1987). TAMC certainly had valid and justified quality control and patient concerns regarding the conduct and performance of its medical staff sufficient to justify the Plaintiffs removal from its medical staff. Consequently, the Plaintiff has failed to demonstrate the monopolistic intent necessary to prove a section two claim. Attempted Monopolization

The elements of a section two violation of Title 42 USC, alleging attempted monopolization are: I)relevant market (including geographic market and relevant product market) in which the alleged attempt occurred; 2) dangerous probability of success in. monopolizing the relevant market; 3) specific intent to monopolize; and 4) conduct in furtherance of such an attempt. As stated above, the Plaintiff has provided no evidence of the relevant market and on this ground, alone, his claim to a Sherman Act violation must fail. In addition, however, the Plaintiff also has failed to demonstrate any intent by TAMC to

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[22] In light of the fact that TAMC and its neighbor Cary Medical Center have engaged in discussions of merger, it would be difficult for the Plaintiff to demonstrate this necessary element

monopolize. The allegation made, and the evidence provided, cannot pass the necessary threshold of proof sufficient to survive a Motion for Summary Judgment. Conspiracy to Monopolize In Copperweld Corporation v. Independence Tube Corporation, 467 US 752 (1984), the Supreme Court concluded that the unilateral actions of a single enterprise are immune from conspiracy allegations under the Sherman Act, despite any corresponding restraint on trade. As an example of"unilateral conduct" the Court described the interactions among corporate officials and those between a parent corporation and its subsidiaries, in the conduct of daily business. Many federal courts have applied the standard, and others, acting on behalfofa Hospital in conducting peer reviews according the Hospital's corporate bylaws. Nurse Midwifery Association v. Hibbett, 918 F.2d 605 (6th Cir. 1990); Nanavati v. Burdette Tomlin Memorial Hospital, 857 F.2d 96 (3d Cir. 1988) and Weiss v. York Hospital, 745 F.2d 786 (3rd 1984). In Oksanen v. Page Memorial Hospital, 945 F.2d 696, 703 (4th Cir. 1991), the Court found that in spite of the fact that the Hospital and its medical staff physicians were legally separate entities, there nonetheless existed a "unity of interest" between the Hospital and the medical staff who evaluated the plaintiff-physician in the context of peer review. The court held, "[c]onsistent with Copperweld, we must examine the substance, rather than the form, of the relationship between the Hospital and the medical staff during the peer review process. When we do so, we find ourselves aligned with those circuits recognizing the applicability of intracorporate immunity to peer review proceedings." Id

In the present case, like a corporation delegating authority to its officers, TAMC, in accordance with its bylaws, convened an Ad Hoc Committee (and its Medical Staff Executive Committee) to review the Plaintiffs performance as staff physician. Functionally, then, the members pf the Hospital medical staff were working as the Hospital's agent, in accordance with the Hospitals' operating bylaws, when conducting its review of the Plaintiff performance. Such delegation of authority does not constitute a combination, conspiracy or intent to conspire by and

between either the Hospital and its staff, or among the physicians comprising the Ad Hoc and E.uecutive Committee, and indeed does not violate section two of the Sherman Act.

The Defendants urge this court to adopt the rational articulated in Oksanen. and derived from Copperweld, and to hold that peer review proceedings instituted at the request of the Hospital in order to promote self-regulation of physician performance and to ensure quality health care, precludes a claim of"conspiracy" between a hospital and the physicians (or between the physicians themselves) who acted at its request, and in its behalf, to review the performance of its health care providers.

Here there is no evidence, apart from the peer review process itself, that a conspiracy existed between TAMC and its physicians, or among the physicians on the committees, to "monopolize part of the medical practice" by terminating this Plaintiff s staff privileges. Rather, in pursuit of quality care, and under the requirement of state and federal law, as well as JCOHA hospital accreditation requirements, the hospitals, through its agents, properly evaluated tl;e Plaintiffs medical performance and professional conduct, and rendered a decision on Plaintiffs staff privileges accordingly.

Antitrust iniury

Finally, with regard to the injury claimed to have resulted from the Defendants' purported violation of Section 2 of the Sherman Act, the Plaintiff has not, nor can he, carry the burden of proof. At Paragraphs xXIv, XXV (p. 12-13), XXVIII (p. 14-15 of his Complaint), the Plaintiff claims to have been professionally injured by the conduct of the Defendants.[23] It is axiomatic that to make out a claim for an antitrust violation a Plaintiff must show more than personal injury. He must demonstrate an adverse impact on comoetition. See, Tarabishi at 1,471; Oksanen at 707. "To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market." Id. at 707, citing Atlantic Richfield Co, v. USA Petroleum Co., 495 US 328 (1990).

The Plaintiff has neither sufficiently alleged, nor produced evidence, to meet the requirement of a showing of antitrust injury. He has not demonstrated his medical staff privilege termination in any way affected competition. His Sherman Act violation allegation must be dismissed.

IV. Attorney's Fees to Defend Against This Frivolous Suit Should Be Granted To Defendants Pursuant to 42 U.S.C, 911113

42 U.S.C. Sect. 11113 allows for the recovery of reasonable attorney's fees for those Defendants successfUl in defending against a claim covered by 42 U.S.C. Sect. 11111 et. seq., where the claims and/or Plaintiffs conduct was "frivolous, unreasonable, without foundation or on bad faith." Assuming the court grants the Defendants' (or any of them) Motion to Dismiss and/or For Summary Judgment, it should also consider allotting to the Defendants their costs in defending. This is especially true considering the Plaintiff has named numerous Defendants against whom he had no viable claim whatsoever. Nonetheless, they were obligated to obtain legal representation and expend both time and money to protect their interests. The award of costs in this case is not only justified but warranted. It will cause this

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[23] The Plaintiffs claims of injury from antitrust violations are defeated, in the first instance, because the Plaintiff voluntarily resigned from TAMC staff in December 1993. (See MFSJ Exhibit 11.)

Plaintiff, and others like him, to carefully evaluate the propriety of suing absent any good faith, legal basis. The purpose of the

Health Care Quality Improvement Act will only be fostered by the utilization of 91 1 1 13 in appropriate cases. This is an appropriate case.

Conclusion

The actio? brought by the Plaintiff against these Defendants is without merit. The statutory immunities of 42 U.S.C. Sect. 1 1 1 1 1 et. sea., and 24 M.R.S.A. Sect. 25 1 1 provide protection from liability as to alleged abuse of process to all named Defendants. The Plaintiffs claims must, as a matter ofiaw, be dismissed.

Furthermore, the Plaintiffs ~1981 and Sect. 1983 claims are without merit and must be dism issed.

Finally, summary judgment in Defendants' favor is warranted on the Plaintiffs anti-trust

claims as there is an utter lack of proof by the Plaintiff sufficienr to send this claim to a jury. DATED at Portland, Maine thislth day of May, 1996..

Esq.

Penny St. Louis, Esq. Attorneys for Defendants

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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
CV-95-0253-B

JAMES BENJAMIN, JR., M.D.,

Plaintiff

THE AROOSTOOK MEDICAL
CENTER, INC., ET AL.,

Defendants

NON-DISPOSITIVE MOTION IN LIMINE #7 - MOTION FOR PARTIAL SUMMARY JUDGMENT #7

(MALICIOUS REPORTING TO BOARD OF REGISTRATION AND DATA BANK)

Defendants move the Court to enter its Order dismissing that portion of the Plaintiff's Amended Complaint alleging improper or malicious reporting of Dr. Benjamin's summary suspension and peer review disciplining to the Maine Board of Registration in Medicine ("Board") and/or the National Practitioner Data Bank ("Data Bank").

I. Background:

Dr. Benjamin has in his Amended Complaint (Count III, Paragraph XLIV, Page 3_3) alleged that the Hospital, through David Peterson, CEO, maliciously and/or improperly made reports to the Board (November 18, 1993) and subsequently to the Data Bank (January 4, 1994) of Dr. Benjamin's disciplining. Copies of the reports are attached
hereto as Exhibits MIL7-A and MIL7-B.

Plaintiff is estopped to claim any impropriety in the legally-mandated reports As previously determined by Justice Pierson in the state-court litigation, Defendants are privileged and

immunized in the reporting requirements under state and federal law. A copy of Justice Pierson's detailed Decision and Order of August 4, 1995 is attached as Exhibit MIL7-C),
Furthermore, Dr. Benjamin himself has testified that he himself reported the summary suspension and corrective action matters to the Maine state Board of Registration in
Medicine (Deposition 1, p. 60).

Defendants herein move the Court to dismiss any and all such claims.

II. Argument:

a. The Health Care Ouality Improvement Act. 42 USC Sect. 11101-11152 152. to

For a general discussion of the federal and state law privileges and immunities for peer-reviewicorrective action matters, the Court's attention is referred to the substantive analysis contained in Defendants' Dispositive Motion.

The HCQIA requires health care entities to report professional review actions adversely affecting a physician's clinical privileges for more than 30 days(Sec.11133)(a)(1)(C). If the health care entity fails to do so, it loses the immunities and privileges recognized and created by the Act.(Sec. 11133)(c). There is no provision in the law creating a sanction for improper content of the required report, which seems to be the basis of Plaintiffs dispute with the report here.

b. Maine law provides for immunity for making the legally-mandated reports (74 M.R.S.A,Sect. 2903 and 32 M.R.S.A,Sect. 3926).

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The federal law was passed in part to guard against the relocation of an incompetent, disciplined or privilege-restricted or credential-denied physician to another state where he would be able to resume practicing medicine with ease. See, generally, Waxman, Sounding Board Medical Malpractice and Quality of Care, 316 N.E. J. Medicine 943 (1987). An important consideration to the Congress in the enactment of the federal law was the appreciation that threats of civil litigation, particularly anti-trust suits, were impeding legitimate peer review activities.

The plaintiffs discovery has failed to demonstrate any improprietv or malice with regard to the reports.

The burden is on Plaintiff to demonstrate impropriety concerning the reports generated and entitlement to cognizable relief therefor. He has failed to do this.

Conclusion:

On the basis of the above analysis, Defendants pray that the Court enter its Order dismissing any and all claims alleging improper and/or malicious reporting to the Board or Data Bank.

DATED at Portland, Maine this7 day of May, 1996.

Penny St. Louis Esq. Attorneys for Defendants